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No. A-854

In The
Supreme Court of the United States
October Term, 1989

JOHN W. McGOWAN,
Petitioner,
vs.
DEPARTMENT OF ENVIRONMENTAL QUALITY,
STATE OF LOUISIANA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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QUESTIONS PRESENTED

A state administrative agency assessed a civil penalty against petitioner, a mineral interest owner, while he was doing necessary work to produce oil from his mineral estate. At the hearing, the Hearing Officer refused to allow petitioner to challenge the scientific and constitutional validity of the regulations and increased his penalty on the grounds that petitioner was recalcitrant for making that challenge. The reviewing judicial court refused to allow petitioner the right to supplement the record, to make oral arguments and did not review or consider evidence challenging those regulations. Under the circumstances:

1. Was McGowan given a fair and impartial hearing at the administrative agency level pursuant to procedural due process rights afforded him by the Four-

teenth Amendment when he was not allowed to challenge the constitutional and scientific validity of regulations which deprived him of the use and enjoyment of his oil and gas properties;

2. Since McGowan was not allowed to make an oral presentation, present evidence, cross-examine and confront witnesses on contested issues of fact in challenging the constitutional and scientific supportability of those regulations and the discretionary interpretation of those regulations by the Department of Environmental Quality (DEQ) at the administrative hearing, was McGowan deprived of Fourteenth Amendment procedural due process rights;
3. Since McGowan was not allowed to defend himself and to protect his property by challenging the scientific and con-

stitutional validity of the regulations during the hearing, was he denied Fourteenth Amendment procedural due process rights in not being afforded the right to a complete record for review on appeal;

4. Was McGowan deprived of constitutional due process rights protected by the Fourteenth Amendment when the reviewing court ruled on the case with the knowledge that they did not have a complete record of McGowan's challenge of the scientific and constitutional validity of the regulations depriving him of the use and enjoyment of his oil and gas properties;
5. Was McGowan deprived of due process rights afforded him by the Fourteenth Amendment when the reviewing court denied him the right to make oral arguments, present evidence, and cross-

examine and confront witnesses on the scientific and constitutional validity of regulations which deprived him of the ability to use his property to produce oil since the Hearing Officer below had determined that McGowan could only question the validity of the regulations in a court of law on appeal;

6. Was McGowan denied due process and equal protection rights guaranteed by the Fourteenth Amendment in that the DEQ through the police power of the state has promulgated regulations which are scientifically unsupportable and excessive and were enforced without procedural safeguards and guidelines which deprived McGowan of the ability to economically develop, use, and enjoy his private property mineral interest

and violated the Takings Clause of the Fifth Amendment; and

7. Was McGowan denied due process rights guaranteed by the Fourteenth Amendment, as that clause incorporates First Amendment type protection of liberty of expression without fear of reprisal when he was threatened with fines up to $1 million if he proceeded with the administrative hearing and was denied the right to challenge the scientific and constitutional validity of the DEQ regulations at the hearing and by the reviewing court on appeal?

PARTIES INVOLVED

Petitioner, John W. McGowan, was the respondent in the hearing before the Department of Environmental Quality (referred to as DEQ), appellant in the First Circuit Court of Appeals of Louisiana, and Petitioner in application for Writs of Review and Certiorari filed in the Supreme Court of Louisiana. Respondent, Department of Environmental Quality, was plaintiff in the hearing before the Department of Environmental Quality, appellee in the First Circuit Court of Appeals of Louisiana, and respondent in the Supreme Court of Louisiana.

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V.
DEPARTMENT OF ENVIRONMENTAL QUALITY

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Petitioner, John W. McGowan, prays that a petition of certiorari be issued to review the denial by the Supreme Court of Louisiana of an Application for Writs of Review and Certiorari from the decision of the Louisiana First Circuit Court of Appeals.

Opinions and Orders Below

The order of the Louisiana Supreme Court denying McGowan's application for Review and Certiorari on February 17, 1989 (App.M,p.141) is reported at 537 So.2d 1168. The opinion of the Louisiana First Circuit Court of Appeals on October 12, 1988 and denial of rehearing on November 30, 1988 (App.K,pp.88-111) is reported at

533 So.2d 999. The First Circuit Court determined that the DEQ hearing officer's actions in increasing the penalty assessment to $56,000 was arbitrary, capricious, and an abuse of discretion, but that McGowan polluted the waters of the State. The Findings of Fact and the Order dated January 16, 1987 asserting a penalty of $56,000 by the Secretary of the DEQ and the Proposed Findings of Fact, Conclusions of Law, and Recommended Penalty of $56,000 dated December 11, 1986 by Hearing Officer is attached thereto (App.E,pp.36-50) and is not reported. The Proposed Penalty of $5,000 by the Secretary of the DEQ on May 23, 1986 was assessed without formal hearing (App.B,pp.7-13) and is not reported.

JURISDICTION

The judgment of the Louisiana First Circuit Court of Appeals (App.K, pp.88-111) was entered on October 12, 1988.

A petition for rehearing was denied on November 30, 1988 (App.K,pp.88). Appellants' Application for Writs of Review and Certiorari was denied by the Louisiana Supreme Court on February 17, 1989. On April 25, 1989, Associate Justice Byron R. White extended the time within which to file a petition for certiorari to June 19, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISION INVOLVED

Constitutional Provisions

The Fourteenth Amendment to the United States Constitution provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment to the United States Constitution provides in pertinent part.

> "Nor shall private property be taken for public use, without just compensation."

The First Amendment to the United States Constitution provides in pertinent part.

> "Congress shall make no law ... abridging the freedom of speech, ... or the right of the people ... to petition the Government for a redress of grievances."

Statutory Provisions

Louisiana Revised Statutes 30:1072(C), 1073(E), 1073(J), 1092, 1093(4), 1093(5), 1095, and 1096, 49:964(E) and 964(G) are reproduced in the appendix to this petition (App.C, pp.14-23).

Regulatory Provisions

In addition to the statutes, the following state regulations are included: Rules 2, 6, 7, and 8 of the Stream Control Commission Amended January 27, 1953; Order of the Stream Control Commission effective July 1, 1968; Water Quality Standards, Sections III, VII.C, VII.C.2, VIII.A, and X; Notification Regulations and Procedures for Unauthorized Discharges, Sections 9.3.5 and 9.3.6; and Louisiana Water Pollution Control Regulations, Sections 2.I.B and 3.I.D, are reproduced in the appendix to this petition (App.C, pp.23-32).

STATEMENT

A. General Background.

Petitioner, John W. McGowan, is an operator and producer of oil and gas production leases who has been buying abandoned and played out oil and gas fields for over 25 years.

On September 1, 1985, petitioner, John W. McGowan purchased oil, gas, and mineral interest property leases in Jefferson Davis Parish, Louisiana which included properties in the Roanoke field referred to as Kratzer, Taylor, and Devilbis properties. The Kratzer mineral lease consists of 163.32 acres, the Taylor mineral lease consists of 170 acres, and the Devilbis mineral lease consists of 160 acres. McGowan also owns and occupies 5.18 acres of the surface estate upon which the Devilbis Lease is located, as well as, the 160 acre mineral lease previously mentioned.

In Louisiana an oil, gas, and mineral lease is recognized as an incorporeal, immovable property interest estate which grants the lessee the right to explore for and produce minerals from the land. The lessee has the right to use an area of the surface estate necessary to drill for oil and gas in order to reduce it to his physical possession. The mineral lease owner may move a drilling rig onto the surface, dig pits and drainage ditches, erect storage tanks, construct pipelines and telephone lines, build roads for ingress and egress, etc., in order to reduce the minerals to his physical possession for sale. The drilling of an oil well may utilize from one to three acres of the land surface area. The reworking of a well may require up to one acre's use of the land surface area. The reworking of the wells is required every few years or so to maintain the continued productivity of oil from the wells. During workover activity, oil and saltwater is spilled on the leasehold estate as necessary work is performed to continue and maintain the productivity of the well.

Over the years McGowan has developed innovative scientific methods that enable him to efficiently and profitably extract oil and gas from these abandoned fields. The revitalization of these old oil fields is messy work, requires considerable sums of capital, scientific expertise and experience, and may require up to two years of McGowan's dedicated time to perfect the recovery of a given played out field. When reworked properly, some of these "played out" fields may produce oil and gas for an additional 25 to 30 years. Although McGowan's system costs more to perfect, it is environmentally safer than industry standards because oil and saltwater spills are virtually eliminated. The spills are eliminated because McGowan's saltwater disposal system is a closed system involving gravity fed injection of saltwater into approved subsection formations without the use of high pressure pumps.

On October 1, 1985, McGowan took possession of the Roanoke oil field and started reworking the wells. The Devilbis, Kratzer, and Taylor wells were reworked, the old and leaking equipment was replaced, and innovative, improved scientific technology was employed to recover the minerals profitably. During this time oil and saltwater was spilled on the leasehold workover area. McGowan eliminated the existing above ground saltwater and oil collecting pits which most of the oil industry still uses. McGowan designed and installed his closed saltwater disposal system, and his present system now has ten times more disposal capacity than the old system did, and it is not above ground.

B. Pre-Hearing Events.

1. DEQ Field Actions and the Saltwater Leak (no effect on State water and no damage to environment noted by DEQ inspector).

On January 27, 1986, David Russell, a McGowan employee, who is a biologist and a geologist, was inspecting the newly acquired leases. An above ground saltwater pit which had been utilized by the previous owners as a dumping pit to collect oil and saltwater from the wells was located on the Devilbis lease. McGowan also owned the surface estate of the Devilbis Pit. Russell noted that a pipe leading from the pit was leaking water. He observed two small puddles of water, one was located near the pipe, and the second puddle was 200 yards from the pipe, but this puddle was 200 yards from Gum Gully, the nearest waters of the State. He further noted that the vegetation around the leak was not damaged but was growing. The leaking pipe was immediately repaired.

On January 31, 1986, four days after the leak at the Devilbis pit had been stopped, Kirk Manuel, a DEQ inspector, inspected the Devilbis lease and took water samples. Manuel noted that the leaks from the pipe did not "effect the waters of the state" and no damage was done to the environment. For a corrective measure he suggested that a lock and chain be put on the valve. Manuel inspected the leases on February 28 and March 6 according to DEQ records, but he did not note any further violations or damage to the growing vegetation on those subsequent inspections of the Devilbis lease on the Facility Inspection forms (App.A, pp.3-6).

2. DEQ Field Action and the Oil Spills (no effect on State waters and no damage to environment).

On February 24, 1986, a faulty flow switch at the Taylor lease malfunctioned and ten barrels of oil flowed into a depression in the pasture next to the well. Eight of the barrels were sucked up and recovered by McGowan. McGowan used hay to absorb the remaining two barrels which was contained on the lease near the well 1/4 mile away from the nearest waters of the state.

On February 28, 1986 four days after the spill on the Taylor lease had been cleaned up and contained, DEQ Inspector Manuel inspected the lease. Manuel indicated that no state waters were effected by the spill and the nearest state waters were 1/4 mile away. He instructed McGowan's men to pick up the hay and dispose of it, and they did. Manuel also noted that 1/2 of a barrel of oil had been spilled at the Kratzer lease, but no problems were noted. No problems were noted at the Devilbis lease (App.A,pp.3-5).

On March 6, 1986, Manuel reinspected the Taylor and Kratzer leases. On that visit he again wrote that the oil "spills did not effect ~~the~~ State waters". He concluded that "the clean up was complete on the Kratzer lease" and "99% complete on the Taylor lease". No problems were noted at the Devilbis lease (App.A,p.5).

On March 18, 1986, John Herlihy, one of McGowan's engineers, called Manuel to ascertain if the inspection from Manuel's March 6 visit to the Roanoke leases required additional attention. Herlihy was told that he would be receiving something from the DEQ soon, but that he was satisfied that nothing else needed to be done.

3. DEQ Office Actions (waters of the State are polluted even though oil and saltwater never reached water).

On April 10, 1986, the Assistant Secretary of DEQ sent a "compliance order" to McGowan charging him with polluting State waters and failing to notify the DEQ of the oil spills on Taylor and Kratzer and of the saltwater leak on Devilbis. McGowan was requested to submit a full, written report on the violations charged. In light of the previous discussions with the DEQ field inspector and notations on the three lease facility inspection reports which indicated that the spills did not effect State waters, McGowan was perplexed. He assumed that the DEQ had made an error. In order to clear up the error

McGowan invited the DEQ to inspect his leases and to verify that no water pollution or contamination of waters had occurred, and that the cleanup was completed pursuant to Manuel's March 6 report (App.A,p.5).

On April 17, 1986, Thomas Killeen (Manuel's supervisor) and Manuel of DEQ inspected the Devilbis, Kratzer, and Taylor leases at McGowan's request. No deficiencies were noted or pointed out (App.A,p.5-6).

On May 1, 1986, an informal hearing between DEQ officers Kirk Manuel, Tom Killeen, and Marion Fannerly and McGowan representatives was held at the DEQ offices. McGowans' representatives went over the information requested by the DEQ and verified that the new saltwater separators and closed system gravity fed disposal wells were operational. They estimated capital improvements in new equipment alone to be over $200,000, and since the new equipment was now operational, future spills would virtually be eliminated.

McGowan's representatives admitted that saltwater and oil spills had occurred on the leases during the reworking of the wells. Manuel admitted that all such spills were contained, cleaned up, and did not contaminate any waters of the State. Manuel's Facility Inspection Reports were referenced as verification for this information. When asked about violations of water pollution and waters of the State, the DEQ officials would not or could not cite the specific sections of the regulations charged. Since the spills were contained on the lease, never reached the water, and were cleaned up without causing harm, McGowan wanted to know what events triggered the requirement to notify the State of water pollution. McGowan was told that the law allowed the DEQ to require him to notify them if pollutants entered the waters of the State. He was told that they would write him a letter.

On May 23, 1986, DEQ sent a Proposed Penalty Notice to McGowan fining him $5,000 for the discharge of oilfield wastes into waters of the State and for McGowan's failure to notify the State of the spills into the waters of the State (App.B,pp.8-13).

On June 4, 1986, McGowan timely requested an adjudicatory hearing to contest the penalty notice and fine.

On September 4, 1986, McGowan was sent a Statement of Charges and was notified that an adjudicatory hearing would be held November 3, 1986 before a hearing officer appointed by the DEQ (App.D,pp.33-35). In the DEQ's Statement of Charges, McGowan was accused of allowing oil and saltwater from his oilfield production site to pollute the waters of the State and for failure to notify the State of the violations committed on January 31, 1986 and on February 8, 1986. The February 8 date was incorrect.

On October 27, 1986, at the prehearing conference, the DEQ offered to reduce the penalty to $3,000 if McGowan would plead guilty to all of DEQ's charges since no environmental harm had occurred. An admission of guilt is used by the DEQ in assessing future penalties and is a public record to be used against respondents in future DEQ actions. When McGowan refused, the DEQ officials threatened him with the maximum fines which the DEQ could assess, i.e. up to $1 million.

C. The Hearing Officer violated McGowan's Constitutional Due Process Rights to challenge the con-

> **stitutional validity of a regulation which takes or deprives him of the enjoyment and ability to produce oil from his mineral lease.**

In the Statement of Charges (App.D, pp.33-35), McGowan was charged with polluting the waters of the State and of not notifying the government of those events. McGowan requested a hearing so he could present scientific evidence to have a fair and impartial adjudication of the validity of the regulations. He noted that the definitions of "pollution", "WATERS OF THE STATE", "significant impairment", "quantitative" and "qualitative" amounts of substances, etc. should be subjected to the challenge of scientific proof so that the working producer in the oil field could avert future infractions. The pertinent statutes and regulations are set out in full in App.C,pp.14-32, and the discussion of the regulations and statutes is in part

C, under Reasons for Granting Petition, infra.

During the hearing McGowan learned from the State's attorney in her opening statement that the State was prosecuting him for water pollution violations for his Devilbis saltwater leak, the oil spills contained on his lease at Kratzer and Taylor, and failure to notify in two of the three instances. He was surprised that he was being prosecuted by the Water Pollution Control Division on the grounds that the substances had entered the waters of the State as defined in La.R.S:1093.

McGowan's attorney asserted that McGowan would prove by scientific and probative evidence that he had not broken the law, that nothing was discharged into the waters of the State that required notification, and that no penalty should be assessed. It was clear that McGowan was seeking clarification of the definitions. He was seeking a judicial interpretation of the DEQ regulations and he was challenging the scientific validity and authority of the regulations because they infringed upon his constitutionally protected right to enjoy and use his private property mineral interest. In doing so he was protecting his investment, and his right to earn a living without causing harm to anyone.

During the hearing from November 3 through November 6, 1986, the Hearing Officer refused to allow McGowan to challenge the constitutional validity of the regulations. He refused to allow McGowan to introduce scientific evidence that would prove that the regulations which McGowan was charged with violating are not scientifically supportable and are vague and arbitrary. The Hearing Officer determined that the constitutional validity of the regulations could not be questioned or challenged during an administrative hearing. He therefore refused to allow McGowan or his experts the opportunity to make an oral presentation, to confront and cross-examine witnesses, and to present evidence on the constitutional validity of the DEQ regulations with a record for appeal (App.E, pp.36-40 and App.N, pp.153,154).

McGowan asserted that the rules and regulations were enforced in an arbitrary and capricious manner by inspectors who are free to use their personal discretion without definitive limits as to the volume or amounts of saltwater and oil which, in their opinion, "significantly impairs" the use of the water for its intended purpose and thus causes water pollution. The DEQ official who was responsible for writing up the fines testified during the hearing that the regulations were clear and unambiguous and that when one glass of saltwater falls on the ground, it will cause water pollution (App.N, pp. 151,152,155). In the words of Justice Holmes, "this regulation goes too far"[1].

The Hearing Officer repeatedly held that the adjudicatory hearing is not the proper forum to question the constitutional validity of a DEQ regulation or to present scientific evidence refuting the scientific validity of those regulations (App.N, pp.143-144,152-154,157-158,164, 167,182). The Hearing Officer did allow some of McGowan's scientific evidence to be introduced showing no harm to the environment had occurred and that the saltwater leak and the oil spill had not reached or effected the state waters. However, when he perceived that the rules were being questioned or challenged, he would refuse to allow further testimony to be heard or a complete record to be made on the grounds that the validity of administrative rules can not be challenged or questioned except in a court of law (App.N, pp.153,182). He refused to allow McGowan to present evidence or make a record to appeal for judicial review to show what the industry's standard of care pertaining to the drilling for oil and the reworking of wells entailed. By not allowing McGowan to introduce this evidence, McGowan was unable to make a record to show that the economic, social, and constitutional property interests of the individual and the state had been properly balanced.

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[1]. Pennsylvania Coal Co., v Mahon, 260 U.S. 393, 415 (1922).

The Hearing Officer's attitude on the subjective connotation of what pollution is and that the regulations can not be challenged can be summed up in the following excerpt from the transcript of the hearing:

> HEARING OFFICER:
> "Sustained. Mr. Boland, again, if you want to attack definitions, if you want to attack the Statute, if you want to attack the procedures, I don't believe this is the right forum. If you don't like the way they do things, that's fine. Go to a court of law that's appropriate jurisdiction and attack it as unconstitutional, inefficient, whatever you want. I don't think I'm here or do I think that I have the authority to rule on any procedures and law that they have, or even on the definitions. I'm here to determine whether or not, as I appreciate it, some type of pollution occurred, and if it occurred, whether a fine should be levied, and if you could limit yourself to those issues, I really would appreciate it. I understand where you're headed, I understand what you're trying to do, but I don't think I'm the right forum to attack definitions, to attack statutory provisions, to attack the way the Department does things,..."

MR. BOLAND:

> "What I'm having a problem with is you apparently know what pollution is."

HEARING OFFICER:

> "It's sort of like pornography, I know it when I see it." (App.N, pp. 153-154).

Pollution does not lend itself to a subjective connotative interpretation like pornography. Materials determined to cause pollution can be scientifically measured, identified, and tested for their propensity to cause harm by experts. Messy looking oil and saltwater dropped on the ground does not constitute water pollution, if the oil and saltwater is contained on private property and disposed of before it ever reaches water, it can not cause water pollution. In the case at bar, the Hearing Officer determined that no harm was caused to state water by McGowan's spills contained on his lease, but he determined from the regulations that the spills caused water pollution. McGowan's experts were not allowed to testify about definitions and interpretations of the regulations by the hearing officer, because the testimony challenged the constitutional and the scientific validity of the regulations.

On November 6, 1986, the hearing was concluded. After the hearing the Hearing Officer submitted his Proposed Findings of Fact, Conclusions of Laws, and Proposed Penalty on December 11, 1986 (App.E,pp.41-50). The Hearing Officer determined that McGowan was recalcitrant for challenging the scientific and constitutional validity of the DEQ regulations and increased the penalty from $3,000.00 to $56,000.00 (App.E,pp.46,50). He further determined that the oil and saltwater leak had entered the waters of the State. He decided that the oil spill caused no harm to the environment, but he opined that the saltwater could have caused harm if someone knew how long the leak had occurred or how much saltwater had leaked out.

D. The Reviewing Court did not afford McGowan his Due Process Rights protected by the Constitution.

On February 18, 1987, McGowan filed a motion to appeal to the Louisiana First Circuit Court of Appeals for review of the case and listed his "Assignment of Errors" pursuant to statute (App.F, pp.53-60).

Louisiana Revised Statute 30:1072(C) of the Environmental Quality Act provides that a person aggrieved by final decision of the DEQ must appeal to the First Circuit Court of Appeals which is an appellate court instead of a trial court (App.C,p.14). This statute provides that the standards for judicial review from rulings of the Secretary of DEQ administrative agency would not follow the scope of review provided in the Louisiana Administrative Procedures Act set out in Louisiana Revised Statute 49:962 and 964 (App.C,pp.21-23). The Court of Appeals is an appellate court and does not have the administrative mechanism to protect due process rights guaranteed by the Constitution when a trial de novo is required with all of the protective rights of an evidentiary hearing. However, the Louisiana Supreme Court in reviewing the scope of judicial review of the Appellate Court in reviewing DEQ decisions and orders has determined that La.R.S. 30:1072(C) is not so limited.

> "There is no substantial difference between the standards of review provided by § 964 and our own jurisprudential rules pertaining to judicial review....Accordingly, since the use of the LAPA statutory scheme in environmental cases promotes clarity of analysis, we will continue to apply the standards of

> judicial review provided by § 964 by analogy."[2]

On July 21, 1987, McGowan timely filed his brief to support his Assignment of Errors which he had previously filed (App. F, pp.51-63). On the first page of McGowan's brief, he requested oral arguments and on the last page of the brief he requested leave of Court to submit additional evidence and to supplement evidence and testimony at the oral arguments pursuant to statute (App.F, pp.51,63). In the jurisdictional statement McGowan alleged that the DEQ had violated rights protected by the following United States Constitutional Provisions: Article III, Fourth Amendment, Fifth Amendment, Sixth Amendment, Ninth Amendment, and Fourteenth Amendment (App.F, p.52).

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[2]. Save Ourselves, Inc., et al v. The Louisiana Environmental Control Commission, 452 So.2d 1152, 1158 (La. 1984).

On August 7, 1987, the State filed its reply brief denying that McGowan's due process constitutional rights had been violated and that water courses included dry ditches (water course would include McGowan's workover lease estate up to the wellhead). The State made a request to increase the penalty to $62,000. Oral Arguments were also requested by the State (App.G,p.65).

On October 1, 1987, McGowan timely filed his Reply Brief (App.H,p.66-75). He also filed a compilation of Non-Louisiana cases cited in his brief, a Motion and Order authorizing McGowan to Present Supplemental Evidence to Support his Substantive Due Process Challenge on the Scientific and Constitutional Validity of the Regulations at the oral arguments (App.I, pp.77-78). He also filed Supplemental Scientific Documentary Evidence along with his Motion and Order to be considered at oral arguments. The materials were filed pursuant to La.R.S. 49:964E. All of these aforementioned materials and pleadings were timely filed with the Appellate Court on October 1, 1987.

In McGowan's Reply Brief, he reaffirmed his request for oral argument and challenged the DEQ rules and regulations as violating his substantive and procedural due process constitutional rights (App.H, pp.66-75). Mcgowan's constitutional challenge reiterated and referenced his challenge from the original brief. Rebuttal arguments in parts A, B, and C of the arguments raised and preserved the federal questions raised in the State's Reply Brief.

On October 16, 1987, the State filed a Motion to Strike McGowan's Reply Brief and his Motion and Order for Supplemental

Evidence to be considered at the oral arguments when the case was to be heard.

On January 10, 1988, McGowan filed his "Memorandum in Opposition of Appellee's Motion to Strike" and again preserved and raised the federal questions (App.J,pp.79-87).

In April of 1988, McGowan received a docket of the cases to be heard by the Court. McGowan's case was designated by the Court to be heard without oral argument on May 3, 1988. Since a ruling on the Motion to Present Supplemental Evidence had not been received by McGowan's attorney, he called the clerk's office to determine if the case or the motion was to be decided on May 3, 1988. McGowan's attorney was told by the Clerk of the Court that the Court had not ruled on his motion yet and it would review all of the issues before it prior to a ruling on the case.

On October 12, 1988, the Louisiana First Circuit Court of Appeals rendered its judgment of McGowan's appeal. It determined that the DEQ Secretary was arbitrary, capricious and had abused her discretion in increasing McGowan's penalty for requesting and having an administrative hearing. The Court also determined that the quantity of oil and saltwater was sufficient to pollute the waters of the State.

The Court did not rule on McGowan's Motion to Present Supplemental Evidence or allow him to be heard regarding his challenge of the scientific and constitutional validity of the DEQ regulations or on the Motion to Present Evidence of that challenge (App.K, pp.88-111).

McGowan filed "an application for Writs of Review and Certiorari from the First Circuit Court of Appeal", but the Louisiana Supreme Court excercised its discretionary jurisdiction and refused to consider the case (App.M, p.141). All federal questions involving the constitutional issues were preserved and raised and were referenced in McGowan's brief (App.L, pp.112-140).

REASONS FOR GRANTING THE PETITION

The decision of the Court of Appeals raises fundamental questions about important and recurring issues regarding the conduct of an agency hearing and the proper role of courts in reviewing the procedural aspects of the agency's conduct of that hearing. When government action deprives a respondent of a fundamental constitutionally protected property right, such as the right to produce oil on his mineral lease estate, then there is a requirement that the governmental process must be fair and impartial. This Court has continually held that "a fair trial in a fair tribunal is a basic requirement of due process."[3] This requirement applies to agencies and government hearing officers as well as judges.[4] McGowan has been deprived of constitutionally protected rights set out by this Court in Mathews. They are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that

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[3]. In re Murchison, 349 U.S. 133,136 (1965).

[4]. Withrow v. Larkin, 421 U.S. 35, 46 (1975).

> the additional or substitute procedural requirement would entail.[5]

McGowan has met the criteria and guidelines by this Court in Mathews,[6] in the administrative hearing and in the reviewing court when he was deprived of his property and deprived by the Hearing Officer and the reviewing court of a forum in which he could present evidence challenging the scientific and constitutional validity of the regulations which deprived him of his property. Under Brock,[7] this court had to search for a constitutionally protected property right. In McGowan's case he is being deprived of his oil, gas, and mineral estate and the right to produce minerals from that estate by the government's interpretation of its regulations. This interpretation prevents McGowan from producing oil and gas from his mineral estate because he can not produce oil without spilling oil and saltwater on his lease during workovers. (Supra at p.7). The enforcement of the State's regulations as interpreted amounts to a taking of his mineral estate without compensation.

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[5] Mathews v. Eldridge, 424 U.S. 319,335 (1976).

[6] Id.

[7] Brock v. Roadway Express, Inc., 107 S. Ct. 1740 (1987).

McGowan meets this Court's guidelines and criteria for a taking in Pennsylvania Coal[8], Hodel[9], Nollan[10], and First English[11] in that this Court has identified several factors. They are:

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[8]. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1972).

[9]. Hodel v. Irving, 107 S.Ct. 2076 (1987).

[10]. Nollan v. California Coastal Commission, 107 S.Ct. 3141 (1987).

[11]. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 107 S.Ct. 2378 (1987).

> "...the economic impact of the regulations, its interference with reasonable investment backed expectations, and the character of the governmental action - ..."[12]

When McGowan was deprived of the right to present evidence at the hearing, he was denied the right guaranteed by the United States Constitution to prove that the administrative agency exceeded the police power of the state in interpreting or enforcing regulations which are not constitutionally valid or scientifically supportable. A hearing officer, in order to give the respondent his day in court, should not prevent the respondent from presenting a defense which proves that he has not violated the law. A respondent should have the right to present a defense and evidence in an evidentiary hearing in order to receive his due process due even if that defense challenges the constitutional validity of the regulations. When a respondent's property is threatened by a taking by the state agency's interpretation of the regulations, a full evidentiary hearing with all of the contested issues of fact and law must be granted with a complete record preserved for appeal. McGowan was denied this right.

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[12] Hodel v. Irving, 107 S.Ct. 2076, 2082 (1987).

McGowan, as a mineral interest property owner, has standing before this Honorable Court to assert his constitutional rights. He has raised and preserved the federal constitutional questions at each stage of the State proceeding even when the agency enforcement proceeding had a chilling effect on his First Amendment rights.[13]

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[13] Supra at p.17.

After the Louisiana Supreme Court exercised its discretion and declined to take jurisdiction of this case, McGowan was denied his last opportunity in Louisiana to receive his day in court to challenge the enforcement and the constitutional validity of the DEQ regulations.

Further, since McGowan has been denied the right to present evidence challenging the scientific supportability and the constitutional validity of DEQ regulations which have deprived him of the use of his mineral estate, we ask this Court to order the Louisiana First Circuit Court of Appeals to hold a trial de novo on these issues pursuant to the holding by this Honorable Court in Ben Avon.[14]

Since the Hearing Officer determined that the agency hearing was not the proper forum to entertain a constitutional challenge to its action and McGowan did not get his day in court, McGowan asserts that this is a "clear case" unlike St. Joseph.[15] McGowan's only remedy is a trial de novo.

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[14] Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920).

A. The Hearing Officer denied McGowan the right to have a fair and impartial hearing before an impartial tribunal with the right to challenge and make a record of that challenge of the constitutional validity of a regulation which deprived him of the ability to use his property to produce oil;

It is averred that McGowan should have the same due process right to challenge an unconstitutional regulation depriving him of the use of his property before an administrative agency as any litigant in a court of law charged with breaking the law and risking fines of a million dollars would have. Since McGowan was risking fines up to $1 million and the right to produce oil from his property, he in fact does have those same rights.

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[15] St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936).

In such a case McGowan's constitutional due process rights requires a full evidentiary hearing including: (1) to be informed of the basis of the State's enforcement action with proper citations to the regulations violated;[16] (2) a neutral decision maker at the hearing;[17] (3) an opportunity to make an oral presentation on the constitutionally challenged regulations;[18] (4) an opportunity to present evidence on the validity of the constitutionally challenged regulations;[19] (5) an opportunity to confront and cross-examine witnesses on the validity of the constitutionally challenged regulations;[20] and (6) an opportunity for a trial de novo[21] if the aforementioned rights have been denied him.

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[16] App. N, pp.142-143

[17] App.K, p.110 where secretary was arbitrary, capricious and abused discretion.

[18] App.E, p.46, McGowan was recalcitrant for challenging the regulations in the agency hearing.

[19] Id.

Additionally, because all of McGowan's aforementioned rights were denied by the Hearing Officer, the record is incomplete[22]. McGowan's defense and evidentiary challenge involved facts which were disputed by men of reasonable intelligence. Definitions and interpretations of the regulations by qualified experts which questioned the State's position were not allowed to be introduced. The property right which McGowan was defending was the use and enjoyment of being able to produce oil from his leases on his leases. The regulations as interpreted by the DEQ and the adoption by the reviewing court of that interpretation deprives McGowan of the right to extract minerals from his lease on his leases.

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[20] Id.

[21] Ohio Valley Water Co. v. Ben Avon Borough, supra.

[22] App.E, supra, note 18.

McGowan is asking this Court not to give deference to this administrative agency's findings of fact and conclusions of law because this agency omitted the respondent's evidence challenging the constitutional validity and scientific truth of contested questions of law and fact involving the validity of those regulations.

B. This Court should grant McGowan's Petition because the Court reviewing the agency ruling violated McGowan's constitutional right to a fair and impartial hearing by not allowing him to present evidence challenging the constitutional validity of regulations which deprived him of the enjoyment of property in the Hearing below.

This case raises fundamental questions about the proper role of courts in reviewing agency decisions when: (1) the constitutional validity of agency rules and regulations have been challenged, (2) the a tribunal was found to be arbitrary and capricious, and (3) respondent was prevented from presenting the evidence supporting his challenge to the validity and the interpretation and constitutionality of the regulations and statutes.

McGowan had reserved the right to have oral arguments and present evidence de novo on the constitutional challenge of the DEQ regulations in his original brief to the Court. McGowan was entitled to have his "Motion to Present Supplemental Evidence to the Court" ruled on prior to the Court's consideration of the case on the merits. Because he had been denied that right, the record was not adequate to rule on the scientific supportability and constitutionality of the DEQ regulations.

Without the consideration and presentation of this evidence, as well as, a record of this evidence and a record of the refused evidence challenging the constitutional validity of the regulations, the Court had no basis for determining that McGowan had not broken the law by polluting the waters of the State.

The reviewing judicial court which is the First Circuit Court of Appeals refused to allow petitioner the right to be heard or make oral arguments. The Court did not review or consider or rule on McGowan's Motion to Present Scientific Evidence filed October 1, 1987. In doing this the Reviewing Court denied petitioner a judicial forum to have a fair and impartial trial to have the constitutional issues challenging the validity of the DEQ's regulations and the validity of the enforcement of those regulations to be heard. This action was taken by the Reviewing Court with the knowledge that the Hearing Officer had determined that McGowan's proper forum to challenge the constitutional validity of the rules was reserved to the reviewing Court on appeal.

Additionally, the Reviewing Court was also aware that: (1) no evidence and no record of any evidence which the Hearing Officer considered to be a challenge of the constitutional validity of the regulations was allowed, (2) no opinion different from the Department's interpretation that "waters of the State" included dry ditches and depressions in fields was allowed or considered, (3) no evidence of the amounts of the quantities and qualities of substances causing "no significant impairment" of the water was allowed, and (4) no evidence showing that pollution of water did not occur if the substances did not reach water was allowed. The Reviewing Court in order to be fair and impartial should have considered McGowan's evidence supporting his arguments that he had broken no laws. The Reviewing Court did determine that the Hearing Officer's decision and penalty of $56,000 was arbitrary, capricious, and an abuse of discretion and reduced it to $5,000.

McGowan is entitled to a judicial trial de novo on the limited issues pertaining to the constitutional validity of the DEQ regulations because of the incomplete trial and record of those issues below. McGowan's due process rights would be further violated if he were to be remanded to the same hostile agency and Hearing Officer to present his additional evidence. The Hearing Officer was determined by the Reviewing Court to be arbitrary, capricious, and had abused his discretion. The Hearing Officer is not and was not an impartial tribunal.

McGowan was denied a forum to challenge the constitutional validity and enforcement of the agency regulations by the hearing officer in the hearing, by the reviewing judicial court in the First Circuit Court of Appeals, and by the Louisiana Supreme Court when it refused to accept jurisdiction of the case.

C. This Court should grant McGowan's Petition because the regulations complained of exceeds the police power of the state and amounts to a taking of McGowan's right to use his property to produce oil without compensation.

McGowan recognizes that the state holds title to land under navigable waters within its limits. He also recognizes the authority of the Federal Government under the Commerce Clause to regulate commerce.

He recognizes the authority of the State pursuant to its police power to protect the water for the health, safety, and welfare of its people. The Louisiana Supreme Court in interpreting this goal has determined:

> Thus, the constitution does not establish environmental protection as an exclusive goal, but requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors.[23]

The DEQ has determined that saltwater and oil are pollutants, that if any quantity of oil and saltwater falls on the ground, it will ultimately enter the waters of the State. The DEQ has determined that if oil and/or saltwater enters a ditch then the ditch is waters of the State. The quantum leap which the DEQ has utilized in usurping authority over private property is based on its use of definitions of waters of the State from the statutes quoted out of context.[24] The DEQ has seized on water course to mean any place from which water may course. Thus, if a glass of water falls on the ground, it will seek lower ground. The course which the water takes becomes a water course. Finally, when oil or saltwater falls on the ground, even though the ground was dry before the "pollutants" hit the ground, after the pollutants hit the ground and start to course, they become waters of the State capable of being contaminated.

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[23] Save Ourselves v. Louisiana Environmental Control Commission, 452 So.2d 1152,1157 (La.1984).

It has been painfully pointed out in the "Statement of Facts" that no mineral lease owner can use his lease to extract minerals from the ground without spilling oil and saltwater on his lease on the ground.

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[24] App.C, pp.14-32.

The DEQ and the reviewing court prevented McGowan from presenting evidence showing that the oil and gas industry could not drill for oil, could not continue to produce oil, and could not rework the wells or change equipment on the wells without spilling oil and saltwater on the ground. The DEQ's interpretation of waters of the State would include McGowan's lease whether that water was within 1/4 of a mile or a thousand miles of his lease. This encroachment of power by the DEQ exceeds the police power of the state when: (1) it can not show that the quantities and quality of the oil and saltwater complained of does cause harm or water pollution, (2) when the definition of waters of the State is so broad that it would prevent McGowan from being able to extract minerals from his mineral estate because no oil company or oil and gas operator can produce oil without spilling it on the ground, and (3) the DEQ's definition of waters of the State is the ground. Under the DEQ's definition of waters of the State the economic impact of the regulation interferes with McGowan's reasonable investment backed expectations to the extent that the enforcement of the DEQ regulations deprives him of his property. The character of the government's action is completely unwarranted. McGowan proved that the quantitative and qualitative amounts of oil and saltwater did not kill the vegetation, did not cause contamination, and did not cause water pollution, but the government refused to allow him to utilize scientific evidence to challenge the constitutional validity of the DEQ regulations to prove that those regulations were null and void.

The proscribed behavior alleged in McGowan's case are discharges into waters of the State as included in La. R.S. 30:1096. Section 1096 states: that "any substance of any kind that would tend to cause water pollution in violation of any regulation, is proscribed, when discharged into any waters of the state." This did not happen! No harm to the environment occurred, and no water pollution occurred from McGowan's saltwater leak and oil spills.

The language in § 1096, "that would tend to cause water pollution" and the difficulty with the term "water pollution" as applied to an open field and a dry drainage ditch, when the spill was contained and was being picked up is obvious. "Tends to cause" water pollution is also an arbitrary and vague term without quantitative evidence to show that water pollution or harm to the water actually occurred.

Marion Fannerly who testified that he had helped write the regulations for the Department opined that he could not identify the particular regulations which applied to the DeVilbis Lease regarding notice unless significant quantities were discharged into the waters of the state. He and Mr. Killeen of the department testified that one glass was significant to him (App.N, p.155). However, no quantitative amounts are listed in any of the regulations, and the interpretation of significant quantities is left to the discretion of the inspector in the field.

Kirk Manuel, the DEQ Inspector who inspected the lease, testified that he did not know which laws or regulations applied to the DeVilbis Lease, but that he just wrote up what he saw and others in the Department interpreted what he had written up (App.N,p.143). If the inspector who works for the Department of Environmental Quality can not properly identify the laws or regulations broken by McGowan, then there is a grave miscarriage of justice in allowing officials who have never even seen the leases to guess at the law. In fact, Manuel testified that there were no regulations relating to a quantity of salt water for a spill like the DeVilbis Lease (App.N,p.143).

Water Pollution Control Regulation Section 2.1.B provides that no pollutant can be discharged into the waters of the state without a permit. The tests performed by the DEQ show that there was no contamination in the area around the leaking valve. Additionally, the DEQ inspector's facility inspection reports indicate that the leak from the DeVilbis Lease did not reach the waters of the state, therefore, no permit was required and no violation occurred. McGowan's experts confirmed that there was no harm to the soil or the water caused by pollution by the amounts of the spills involved, and, therefore, this rule was not broken.

Section 3.1.D prohibits a discharge of any pollutant in quantities exceeding permitted limits, however, there are no quantitative standards or amounts set out which allows anyone to know what a permitted limit is. The key word to this section is whether or not the leak from the lease was a "pollutant". No evidence was introduced by the State to verify that the discharge was a pollutant, contaminant, or that any harm resulted from the spill. However, the Agency Hearing Officer prevented McGowan from proving that the amounts complained of could not cause water pollution or harm.

The scientific evidence which McGowan was allowed to introduce clearly proved that neither spill ever reached water or ever caused harm to the environment (App.N, p.155-182).

The Stream Control Commission Regulations adopted January 27, 1953 is a general rule pertaining to the discharge of oil and salt water in the oil field. Rule 2 provides that "no oil shall be allowed to flow on the ground ... from the original lease or allowed to flow into a stream". The oil on the Taylor Lease stayed on the original lease and did not enter the "waters of the state". The discharge from the DeVilbis Lease also stayed on the lease and did not enter the waters of the state. Therefore, Rule 2 was not violated, and the Hearing Officer and the Court of Appeals erred in ruling that these rules were broken.

Rule 7 prohibits "the discharge of oil field brine into any stream...ditch or surface drainage leading to any stream... _when it is determined that the discharge would affect the palatability of a source of potable water to an appreciable degree_". No evidence was introduced by the State to show that the water from the leaking valve ever got into the water supply since the leak had stopped 200 yards from the nearest uninterrupted body of water, so this regulation was not broken by McGowan.

The order of the Stream Control Commission effective July 1, 1968 prohibits the drain or flow of salt water into the waters of the State of Louisiana except:

"(1) salt water may be disposed of in normally saline waters, tidally affected waters, brackish waters, or other waters unsuitable for human consumption or agricultural purposes". The order provides for individual judgment to be exercised where the water is not clearly brackish, etc. In the case at bar, it was determined that the receiving waters, if the leak had ever gotten that far, was primarily used for agricultural purposes. The state's witnesses however stated that the receiving waters were not affected at all.

The DEQ requires notification if pollutants enter the **WATERS OF THE STATE** in the following cases: (1) if the discharge is "significant" (sec. 9.1.1); (2) if the discharge is "reasonably expected" to result in violation of Louisiana water quality standards (sec. 9.3.6); and (3) if the discharge may "reasonably be expected" to result in "significant impairment" of "designated water usage" (sec. 9.3.6).

One can determine from all of these rules, that you can not judge pollution by its "tendency" to cause "water pollution"; or by its "adverse affect on the palatability" of potable water; or by its impairment of lawful use of water; or where aquatic life may be destroyed or injured. No proof was introduced by the DEQ to show that McGowan violated 9.3.5. Additionally, the Hearing Officer would not allow McGowan to prove that the amounts of the substances cited in the amounts found could cause water pollution.

In the case at bar, words like "substantially increase", "appreciably injure human life", "materially injure or interfere with reasonable animal or plant life or property" all are quite ambiguous; that ambiguity is surpassed only by Louisiana's Water Control Regulations. Such words as "significant", "reasonably expected to be a violation", and "designated water uses" all purport to instruct a possible violator as to when he needs to notify the Department of Environmental Quality of an improper spill into WATERS OF THE STATE. (9.3.6 of Notification Requirements).

In McGowan's case we have conflicting and indefinite regulations that attempt to identify what water pollution is and what an infraction is as the first step to notification. Because "waters of the State" has been so arbitrarily assigned definitions by the DEQ, the notification procedures' ambiguity, the facts and the jurisprudence simply do not support a finding that McGowan violated DEQ's regulations. The Court of Appeals' findings and penalty if not reversed by this Honorable Court is a taking of McGowan's property.

D. This Court should grant McGowan's Petition because the Agency and reviewing court denied McGowan an opportunity to be heard or to assert his defenses in the agency hearing and in the reviewing court and to defend the taking of his property rights in a fair procedure without being subjected to the exposure of excessive fines which was a violation of his first amendment rights.

It is averred that the DEQ's threat to seek the maximum penalties up to one million dollars if McGowan would not plead guilty and accept a reduced fine of $3,000, had a "chilling effect" on his freedom of speech rights to be heard before a fair and impartial tribunal. When the hearing officer refused to let McGowan testify and make a record at the agency hearing of his challenge of the scientific and constitutional validity of the regulations, McGowan was denied his freedom of speech rights again. When the reviewing court refused to allow oral arguments to be made and refused to allow McGowan the opportunity to present evidence at the reviewing court on the constitutional issues, McGowan's freedom of speech rights were violated again. No record of what McGowan wanted to say challenging the scientific and constitutional validity of the regulations was made a part of the record for the Louisiana Supreme Court to consider. When the Louisiana Supreme Court refused to exercise its discretion and hear McGowan's case in the Louisiana Supreme Court, McGowan was denied his First Amendment Freedom of Speech Right to be heard and to petition the Government for a redress of the grievances to which he was subjected.

CONCLUSION

The facts of this case demonstrates that John McGowan's property was taken when the DEQ exercised its police power to penalize McGowan's use of his oil and gas properties. He asked for "his day in court" to show that the DEQ rules and regulations were unconstitutional and not scientifically supportable, and that the DEQ unreasonably interpreted the rules, particularly in its interpretation of "waters of the State". The Hearing Officer and the reviewing judicial court denied McGowan the right and opportunity to challenge the validity and interpretation of the rules and regulations, and therefore those tribunals did not fairly balance the use of the state's police power versus the property interests of the individual. McGowan's procedural due process rights were denied, his constitutionally protected property rights were taken, and he asks this Honorable Court to grant certiorari so that he may be afforded his day in court.

APPENDIX A

Excerpts Taken from "Facility Inspection Form," January 31, 1986

Inspection by DEQ Inspector Kirk Manuel of Devilbis Lease.

Manuel's Observation:

"Inspector's observations, problems, remarks, verbal commitments from facility representatives:

Inspect facility re compliant from conservation department inspector Pat Sarsfield about salt water discharges from the above facility - No discharge at time of inspection - Inspection showed evidence of previous discharge from 3" valve & line from oil salt water pit. (undetermined amount) - Mr. Herlihy said that he was unaware of the discharge which may have occurred - Photos taken of discharge pipe & ditch to drainage ditch - sample taken of water (standing) in drain ditch & level - conductivity (Mx) from drain ditch adjacent discharge valve was
~16,000 umHos sal - ~8.8ppt.
1/4 mile drain ditch cond - 15,000 umHos
sal - 8.9ppt
downstream receiving waters (canal)
cond 130 umHos sal - .070ppt
upstream receiving waters (canal)
cond 128 umHos sal - .070ppt
No effect noted on Receiving water (drainage canal)"

p.2
"Inspectors observations, problems, remarks, verbal commitments from facility representatives (continued):

This facility was recently purchased by the above operator around 10-85. Bought from Tenneco - Inspection of the facility showed that progress has been made in cleaning up housekeeping problems around these old leases - all of the salt water disposal wells (4) are being reworked & will be able to handle ~ 10 times the expected salt water production of the field-

No other problems observed in other leases - Small drainage canal downstream from discharge area showed no effect caused by salt water discharge - a strong flow was noted in drainage canal at time of inspection - all salt water would have been flushed out by flow - it was clearly obvious that the discharge had occurred several days prior this inspection.

Mr. Herlihy was fully aware of reg's on salt water discharge & he stated that he was unaware of how discharge occurred.

I recommend that a lock be put on Devilbis in pipe from pit.

Conservation Department agent Steve Culpepper said they would be seeking enforcement action against McGowan for this & other violations of conservation dept. regs at this facility."

Excerpts from "Complaint Form" filed by DEQ, Water Pollution Control Division, Written by Kirk Manuel on February 12, 1986.

"Investigator's Preliminary Assessment: Report to Follow:

Inspect facility with company man - Mr. Herlihy - found 3" pipe with valve in levee of large salt water pit. Evidence of discharge of salt water in small drain ditch adjacent pipe & valve - reddish discoloration of soil & water indicative of high chloride content - Photos taken of discharge area-

conductivity in ditch - ~16,000 umHos
sal. 8.9ppt

samples taken of drain ditch for Cl analysis

conductivity in receiving water (canal downstream of discharge area)
cond - ~130,umHos sal - .070ppt
upstream discharge
cond - ~128,umHos sal - .070ppt
Receiving water (drainage canal) had strong flow at time of inspection."

Excerpts Taken from "Facility Inspection Form", February 28, 1986

Inspection by DEQ Inspector Kirk Manuel of Taylor and Kratzer lease.

Manuel's observations:

"Inspector's observations, problems, remarks, verbal commitments from facility representatives:

Inspect Facility re call from Conservation Dept. Agent Sarsfield about oil spills noticed at above 2 leases.

1. Kratzer lease - evidence of oil in spill drain ditch behind tank battery - drain ditch had few spots of standing oil & some oily residue on vegetation & soil in ditch - contamination extends down drain ditch for approximately 1/2 mile diminishing with distance - amount spilled could not be determined as was evident by amount & age of the oil on the ground vegetation - probably less than 1/2 BBL -

spoke by phone to J. Herlihy and informed him of findings; he said they would clean material up.

– 2. Taylor lease - 2-24-86 on oil spill caused by tank overflow - amount spilled estimated at less than 10 BBLs - (by this inspector)."

p.2
"Inspector's observations, problems, remarks, verbal commitments from facility representatives:

This oil flowed into a small depression in a large cow pasture - oil flowed over 350 to 400 yds of this depression ~10 ft. wide and over about 1 acre of land adjacent tank battery - an attempt at cleanup was made by using hay as absorbent and covering some with soil in depression area -

*'Mr. Smith said that some of the oil was recovered by pump & hose.' Remainder was covered by hay and some remains standing in depression - cleanup was not complete as some oil (about 2 BBLs) still remains visible in the depression - This oil could flow to State Waters & cause problems with any rainfall (main drainage canal ~1/4 mile away)

*Recommended to Mr. J. Herlihy by phone that this oil spill be completely cleaned up to prevent contamination to State Waters -oily waste & absorbent material should be disposed of properly - Mr. Herlihy said he would clean it up.

This spill was not reported to La. DEQ Water Pollution Control.

*Recommended to Mr. Herlihy by phone that all oily material and absorbent material be cleaned up from these sites so as to prevent any storm water contamination.

I will return upon completion to verify cleanup.

PHOTOS TAKEN & AVAILABLE"

Excerpts taken from "Facility Inspection Form", March 6, 1986

Inspection by DEQ Inspector Kirk Manuel of Roanoke Field.

Manuel's observations:

"Inspector's observations, problems, remarks, verbal commitment from facility representatives:

Inspect cleanup of oil spill reported by Conservation dept. at property operated by above company. Spill did not affect State Waters.

Taylor lease - oil removed from ground - some small pockets of standing oil visible after rainfall worked some of material from ground.

Mr. Smith will remove remaining pockets formed [sic] from standing water at Taylor lease -cleanup 99% complete.

Kratzer lease - small drain ditch cleaned & cleanup complete."

Excerpts taken from "Facility Inspection Form", April 17, 1986

Inspection by DEQ Inspectors Kirk Manuel and Thomas Killeen (Manuel's supervisor) of Devilbis, Taylor, and Kratzer leases in Roanoke field.

Manuel's and Killeen's observations:

"Inspector's observations, problems, remarks, verbal commitments from facility representatives:

Followup inspection of above leases addressed in compliance order #WC86047, as per Mr. McGowan's request. At present no more salt water was observed at Devilbis lease - ditch showed no further signs of salt water discharges.

Taylor lease oil spill was observed - some oil contaminated soil observed in ditch - it appears that the soil was incorporated into the ditch area - tank battery fire wall still heavily contaminated with oily material.

Kratzer lease - oil spill area cleaned up."

APPENDIX B.

May 23, 1986

Mr. John McGowan
P.O. Box 55809
Jackson, MS 39296

NO. WC-86-047
CERTIFIED MAIL
(P113230570)
RETURN RECEIPT
REQUESTED

Dear Mr. McGowan:

Attached, please find a Proposed Penalty Notice issued to John W. McGowan, as a result of violations of the Louisiana Environmental Quality Act at your oilfield sites identified as the Devilbis Lease No. 19, S11, T09S, R04W; the Taylor Lease No. 3, S12, T09S, R04W; and the Kratzer Lease No. 1, S12, T092, R04W; all in the Roanoke Field of Jefferson Davis Parish, Louisiana. Please contact Mr. Tom Killeen if you have any questions concerning this matter.

Sincerely,
/s/
J. Dale Givens
Assistant Secretary

JDG/TBK/avn

STATE OF LOUISIANA
DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF:
JOHN W. McGOWAN

PROPOSED
PENALTY NOTICE

PROCEEDINGS UNDER THE
ENVIRONMENTAL QUALITY
ACT, LA.R.S. 30:1051 ET SEQ

The following PROPOSED PENALTY NOTICE is issued to JOHN W. McGOWAN, (Respondent) by the Secretary, Louisiana Department of Environmental Quality, under authority granted by the Louisiana Environmental Quality Act, (La.R.S. 30:1051 et seq., hereinafter referred to as "the Act"), and particularly by Section 1073 E of the Act.

FINDINGS OF FACT

I.

Respondent operates oilfield production sites identified as the Devilbis Lease No. 19, the Taylor Lease No. 3 and the Kratzer Lease No. 1; all located in the Roanoke Field of Jefferson Davis Parish, Louisiana. Respondent is not authorized to discharge any waste substances into the waters of the State.

II.

Investigation by employees of the Department has disclosed that on or about January 31 and February 8, 1986, Respondent did cause or allow the discharge of oilfield wastes (i.e. oil, saltwater) from the above described sites in violation of the Louisiana Water Pollution Control Regulations, Section 2.I.B. and 3.I.D.; the Regulations of the Stream Control Commission governing disposal of waste oil, oilfield brine, and all other materials resulting from the drilling, production, and transportation of oil, gas or sulphur adopted January 27, 1953; the Order of the Stream Control Commission effective July 1, 1968; and Sections 1095 and 1096 of the Louisiana Environmental Quality Act.

III.

Investigation by employees of the Department has disclosed that Respondent failed to notify this agency of the above mentioned discharges, in violation of the Department's Notification Regulations and Procedures for Unauthorized Discharges and Section 1073 and 1096 of the Act.

IV.

Having considered the factors set forth in Section 1073 of the Act, and in light of all presently known facts and circumstances in this matter, a civil penalty in the amount of $5,000 would be appropriate, equitable, and justified.

ORDER

Based on the foregoing FINDINGS OF FACT, Respondent is hereby ORDERED to be on notice that:

I.

An assessment of a penalty in the amount of $5,000 is hereby proposed and shall become effective, final, and not subject to further review, unless, no later than twenty (20) days after receipt of this document, Respondent files with the Secretary a written request for a hearing.

II.

Failure to timely request a hearing as provided in Paragraph I of this ORDER constitutes a waiver of Respondent's right to a hearing under the provisions of Section 1073 E of the Act for the violations described hereinabove.

III.

Upon failure to request a hearing as provided in Paragraph I of this ORDER, Respondent must make payment in full of the civil penalty set herein, or make arrangements satisfactory to the

Department for payment, no later than fifteen (15) days after the assessment becomes final.

IV.

Upon the penalty assessed herein becoming final because of Respondent's failure to timely file a request for a hearing, and upon Respondent's failure to pay the civil penalty provided herein or to make arrangements satisfactory to the Department for such payment, this matter shall be referred to the Attorney General for collection of the penalty plus all costs associated with the collection.

V.

Upon timely filing of a request for a hearing, this ORDER, including the assessment of penalty, shall be rescinded and this matter shall be scheduled by the Secretary of the Department of Environmental Quality for de novo determination of the appropriate enforcement actions, including the assessment of civil penalties through the adjudicatory and discovery processes provided in the Administrative Procedure Act (La.R.S. 49:950 et seq.) and the provisions of the Act, particularly Section 1073 E(3)(a) thereof, or referral to the Attorney General's office for judicial enforcement.

This ORDER is effective on receipt.

Done at Baton Rouge, Louisiana, on this 22nd day of May, 1986.

/s/
PATRICIA L. NORTON, Secretary
Department of Environmental
Quality

APPENDIX C

LOUISIANA STATUTES AND REGULATIONS

STATUTES

Louisiana Revised Statutes 30:1072(C)

"C. Any person aggrieved by a final decision or order of the secretary may appeal therefrom to the Court of Appeal, First Circuit, if a motion for an appeal is filed with the secretary within thirty days after the final decision or order is served upon the respondent. Any preliminary, procedural, or intermediate ruling or decision by the secretary is subject to supervisory jurisdiction of the appellate court as provided by Article V, Section 10 of the Constitution of Louisiana. The Court of Appeal, First Circuit, shall promulgate rules of procedure to be followed in taking and lodging such appeals. The provisions of R.S. 49:962 and 964 shall not apply to decisions and orders of the secretary."

Louisiana Revised Statutes 30:1073(E)

"(1) Any person found to be in violation of any requirement of this chapter may be liable for a civil penalty to be assessed by the commission, the secretary, the assistant secretary, or the court of not more than one million dollars or the cost of any cleanup made necessary by such violation and a penalty of not more than twenty-five thousand dollars for each day of violation and may be subject to the revocation of suspension of any permit, license, or variance which has been issued to said person. Any person found to be in violation of this Chapter shall be liable for legal interest from the date of the assessment of a civil penalty until paid.

(2) Any person to whom a compliance order or a cease and desist order is issued pursuant to R.S. 30:1073(C) who fails to take corrective action within the time specified in said order shall be liable for a civil penalty to be assessed by the commission, the secretary, the assistant secretary, or the court of not more than fifty thousand dollars for each day of continued violation or noncompliance.

(3)(a) In determining whether or not a civil penalty is to be assessed and in determining the amount of the penalty or the amount agreed upon in compromise, the following factors shall be considered:

(i) The history of previous violations or repeated noncompliance.

(ii) The nature and gravity of the violation.

(iii) The gross revenues generated by the respondent.

(iv) The degree of culpability, recalcitrance, defiance, or indifference to regulations or orders.

(v) The monetary benefits realized through noncompliance.

(vi) The degree of risk to human health or property caused by the violation.

(vii) Whether the noncompliance or violation and the surrounding circumstances were immediately reported to the department and whether the violation or noncompliance was concealed or there was an attempt to conceal by the person charged.

(viii) Whether the person charged has failed to mitigate or to make a reasonable attempt to mitigate the damages caused by his noncompliance or violation.

(ix) The costs of bringing and prosecuting an enforcement action, including staff time, equipment use, hearing records, expert assistance, and such other items as the commission finds to be a cost of the action.

(b) The secretary may supplement such criteria by rule. In the event that the order with which the person failed to comply was an emergency cease and desist order, no penalty shall be assessed if it appears upon later hearing that said order was issued without reasonable cause.

(4) No penalty shall be assessed without the person charged being given notice and an opportunity for a hearing on such charge. The person charged may waive a hearing on the issue of whether or not a violation has occurred, his culpability for such a violation and any other ultimate issue. When a hearing on the violation is waived, a decision may be rendered upon the uncontested facts.

(5) After submission for a penalty determination at a hearing, the commission, secretary, or assistant secretary shall provide an opportunity for relevant and material public comment relative to any penalty which may be imposed."

Louisiana Revised Statutes 30:1073(J)

"Any person who discharges, emits, or disposes of any substance in contravention of any provision of this Chapter or the regulations or of any permit or license terms and conditions issued thereunder, upon learning of the discharge, emission, or disposal, shall immediately, or in accordance with regulations adopted under this Chapter, notify the department, the Department of Public Safety and Corrections, and local law enforcement authorities as to the nature and amount thereof and the circumstances surrounding same. The secretary shall adopt and promulgate rules and regulations establishing procedures for making such notification. Any failure to make this notification required herein shall constitute a separate violation, and shall be in addition to any other violations of this Chapter."

Louisiana Revised Statute 30:1092

"The legislature finds and declares that the waters of the state of Louisiana are among the state's most important natural resources and their continued protection and safeguard is of vital concern to the citizens of this state. To insure the proper protection and maintenance of the state's waters, it is necessary to adopt a system to control and regulate the discharge of waste materials, pollutants, and other substances into the waters of the state."

Louisiana Revised Statute 30:1093(4)

"Water pollution" means the introduction into waters of the state by any means, including dredge and fill operations, of any substance in concentrations which tend to degrade the chemical, physical, biological, or radiological integrity of such waters, including, buy not limited to, the discharge of brine from salt domes which are located on the coastline of Louisiana and the Gulf of Mexico into any waters off said coastline and extending therefrom three miles into the Gulf of Mexico."

Louisiana Revised Statute 30:1093(5)
"Waters of the state" means both the surface and underground waters within the state of Louisiana including all rivers, streams, lakes, groundwaters, and all other water courses and waters within the confines of the state, and all bordering waters and the Gulf of Mexico."

Louisiana Revised Statute 30:1095
"No person shall conduct any activity which results in the discharge of any substance into the waters of the state without the appropriate permit or license required under the regulations of the commission adopted pursuant to this Part."

Louisiana Revised Statute 30:1096
"A. (1) No person shall discharge or allow to be discharged into any waters of the state:

(a) any waste or any other substance of any kind that will tend to cause water pollution in violation of any rule, order, or regulation; or

(b) any substance, the discharge of which violates any term, condition, or limit imposed by a permit.

(2) The provisions of this Part shall not apply to any unintentional nonpoint-source discharge resulting from or in connection with the production of raw agricultural, horticultural, or aquacultural products.

(3) No person shall violate any rule or regulation adopted under this Part

of the terms of any permit or order issued under authority of this Chapter.

(4) No person shall cause or allow to be discharged within Louisiana any trash, garbage, sewage, or sewage sludge in contravention of any rules or regulations adopted pursuant thereto and authorized by R.S. 30:1094(B)(7).

B. No person engaged in a logging operation shall discharge or leave, or allow to be discharged and left, in any of the navigable waters of the state any trees or treetop. For the purpose of this Subsection, the term "treetop" shall be defined as that topmost portion of a tree trunk, with limbs attached, measuring in excess of three inches at the base of the treetop stem.

C. No person shall discharge brine from salt domes which are located on the coastline of Louisiana and the Gulf of Mexico into any waters off said coastline and extending therefrom three miles or more into the Gulf of Mexico when it becomes evident to the office that said discharge is damaging or threatens to damage the aquatic life in the waters of the state. The office may require that any brine disposal be monitored in accordance with rules and regulations.

D. Any person who discharges, emits, or disposes of any substance into the waters of the state in contravention of any provision of this part of the regulations or of the terms and conditions of a permit or license issued thereunder, upon learning of the discharge, emission, or disposal, shall immediately, or in accordance with regulations adopted under this Chapter, notify the offices as to the nature and amount of the discharge and the circumstances surrounding the discharge. The secretary shall adopt and promulgate rules and regulations establishing procedures for making such notifications. Any failure to make this notification or any attempt to conceal or actual concealment of the discharge, emission, or disposal shall be a violation of this Part. Each day of failure to give the notification required herein shall constitute a separate violation and shall be in addition to any other violations of this Chapter.

E. Any person who knowingly makes any false statement, representation, certification in any application, record, report, plan, or other document filed or required to be maintained under this Part or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Part shall upon conviction be punished by a fine of not more than twenty-five thousand dollars or by imprisonment for not more than six months, or both.

F. No person shall discharge into any underground waters of the state any hazardous waste as defined in R.S. 30:1133(2). The provisions of this Subsection are not intended to impair the implementation or administration of those programs authorized by R.S. 30:4(C)(16), R.S. 30:1091, and R.S. 30:1136(A)(6), as long as permitted injections are conducted in strict adherence to the terms and conditions of a valid permit issued thereunder or under the rules and regulations adopted thereunder.

G.(1) The legislature of Louisiana hereby finds that a significant portion of the phosphate fertilizer and wet-process phosphoric acid manufacturing industry is located in the state of Louisiana, that the manufacture of wet-process phosphoric acid results in the generation of byproduct waste gypsum, and heretofore such gypsum has been disposed of by impoundment on land or by discharge into the Mississippi River. The Mississippi River is a valuable natural resource that must be protected against unnecessary degradation in order to protect and preserve the public health and welfare, drinking water quality, and major sectors of the economy including tourism and seafood industries, and the environment.

(2) No person shall discharge byproduct waste gypsum from the production of phosphate fertilizer or wet-process phosphoric acid into the Mississippi River. This prohibition shall not apply to authorized discharges of waste waters or rainfall runoff containing dissolved gypsum or suspended gypsum when such discharge is in compliance with state and federal permits and the discharge is not for the primary purpose of disposing of byproduct waste gypsum."

Louisiana Revised Statutes 49:964(A)

"A. A person who is aggrieved by a final decision or order in an adjudicatory proceeding is entitled to judicial review under this Chapter whether or not he has applied to the agency for rehearing, without limiting, however, utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law.

A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy and would inflict irreparable injury."

Louisiana Revised Statutes 49:964(E)
"E. If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court."

Louisiana Revised Statutes 49:964(F)
"F. The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs."

Louisiana Revised Statutes 49:964(G)
"G. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative

findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(6) Manifestly erroneous in view of the reliable, probative, and substantial evidence on the whole record. In the application of the rule, where the agency has the opportunity to judge of the credibility of the witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues."

LOUISIANA REGULATIONS

Rule 2 of Stream Control Commission
Amended January 27, 1953

"No oily fluids shall be discharged to, or allowed to flow on the ground, or be carried from the original lease in open ditches, or discharged or allowed to flow into any stream, lake or other body of water."

Rule 6 of Stream Control Commission
Amended January 27, 1953.

"No salt water shall be discharged from a lease until all oily waste has been completely separated therefrom, except in cases where the transfer of such salt water from the lease to a central treating plant has been approved in writing by the Stream Control Commission or one of its agents. Separating pits or other equally effective device, for separation of oily wastes from oil field brine shall be constructed and operated such that no oily waste will be carried from the lease, except to central treating plants, and shall meet any reasonable minimum requirements set up in any particular field or lease by the Stream Control Commission. In oil field brine discharged to streams the oil content shall not exceed 30 p.p.m."

Rule 7 of Stream Control Commission
Amended January 27, 1953

"No oil field brine shall be discharged into any stream, lake, or other body of water, or into any ditch or surface drainage leading to any stream, lake, or other body of water when it is determined by the Stream Control Commission that such discharge would adversely affect the palatability of a source of potable water to an appreciable degree, or would be deleterious to the Public Health, or to the prosecution of an industry or lawful occupation for which or in which any such waters may be lawfully used or employed, or whereby the carrying on of any agricultural pursuit may be injuriously affected or whereby the lawful conduct of any livestock industry or the use of any such waters for domestic animals may be prevented, injuriously affected or impaired, or whereby any lawful use of any such waters by the State of Louisiana, or by any political subdivision, or by any corporation, association, partnership, or person, or any other legal entity may be lessened or impaired, or materially interfered with, or whereby any fish life, or any beneficial animal or vegetable life in said waters may be destroyed, or the growth or propagation thereof prevented or injuriously affected; provided that oil-free brine may be discharged under maximum dilution ratios prescribed for any particular stream or field by the Stream Control Commission, or during any particular period in which such discharge is determined by the Commission to be free from pollution hazard, or necessary in the public interest."

Rule 8 of Stream Control Commission
Amended January 27, 1953

"Wherever possible, disposition of oil field brine shall be accomplished by discharge through disposal wells to underground horizons below the fresh water level, such wells to be so drilled, cased, cemented, equipped, and operated that no fresh water horizon shall be polluted; provided that this rule shall not apply in fields or areas where it is determined by the Stream Control Commission that disposal of the brine is or may be accomplished by discharge into water bodies normally or seasonably sufficiently saline as to preclude any actual or potential pollution hazard due to such discharge."

Order of Stream Control Commission
July 1, 1968

"Effective July 1, 1968, it shall be the order of the Louisiana Stream Control Commission that no oil field wastes, including salt water, produced by gas or oil field operations in the State of Louisiana shall be allowed to drain or flow into waters of the state except:

(1) Salt water may be disposed of in normally saline waters, tidally affected waters, brackish waters or other waters unsuitable for human consumption or agricultural purposes. Where quality of receiving waters is not clearly brackish, saline or tidally affected, or unsuitable for human consumption or agricultural purposes individual judgment shall be rendered by the Stream Control Commission; and

(2) As further provided under the applicable Rules and Regulations of the Department of Conservation.

Nothing herein contained is intended to repeal, modify or otherwise effect existing regulations of this Commission."

Water Quality Standards, Sec.III, definitions, Louisiana Register, p.746, Oct. 20, 1984

"Water pollution" means the introduction into the waters of the state by any means, including dredge and fill operations, of any substance in concentration which tends to degrade the chemical, physical, biological, radiological integrity of such waters, including, but not limited to, the discharge of brine from salt domes which are located on the coastline of Louisiana and the Gulf of Mexico into any waters off said coastline and extending therefrom three miles into the Gulf of Mexico."

Water Quality Standards, Sec.III, definitions, Louisiana Register, p.746, Oct. 20, 1984

"Waters of the State" means both the surface and underground waters within the State of Louisiana including all rivers, streams, lakes, groundwaters, and all other watercourses and waters within the confines of the state, and all bordering waters of the Gulf of Mexico."

Water Quality Standards, Sec.VII.C, Louisiana Register, p.749, Oct. 20, 1984

"Numerical Criteria-Numerical criteria identified in the numerical criteria tables apply to the specified waterbodies, and their tributaries, distributaries, and ancillary streams and waterbodies if they are not specifically named therein. Those waterbodies which are officially approved and designated by the state and EPA as intermittent streams or man-made watercourses are excluded. Numerical criteria specifically apply to water quality conditions of the surface waters of the state that are attributed to waste discharges or activities of man as opposed to natural conditions."

Water Quality Standards, Sec.VII.C.2, Louisiana Register, p.750, Oct. 20, 1984

"Chlorides, Sulfates, & Total Dissolved Solids-Numerical criteria for these parameters generally represent the arithmetic mean of the nearest existing data plus one standard deviation. For estuarine stream segments in the numerical criteria tables which have no listed criteria (i.e. designated N/A), criteria will be established on a case-by-case situation based on field determination of ambient conditions and the designated water uses. Some stream segments have been assigned interim numerical criteria pending the collection of long term data. Interim criteria, however, shall be the applicable standard until long term data becomes available. Revised criteria for these segments will be provided as this data becomes available. Criteria may eventually be set lower or higher depending on results of data analyses. Interim criteria are denoted by an asterisk (*) in the numerical tables. For tributary, distributary and ancillary streams and waterbodies not specifically listed in numerical criteria tables, increases over background levels of chlorides, sulfates and total dissolved solids may be permitted. Such increases will be at the discretion of the Office on a case-by-case basis and shall not cause instream concentrations to exceed 250, 250 and 500 mg/L for chlorides, sulfates and total dissolved solids, respectively. Such increases, in addition to background conditions shall consider effects on resident biota and downstream waterbodies. Under no circumstances, shall an allowed increase induce a violation of any numerical criteria in any listed waterbody or a violation of any other general or numerical criteria in either listed or unlisted waterbodies."

Water Quality Standards, Sec.VIII.A, Louisiana Register, pp. 751-752,Oct. 20, 1984.

"Background-Water Quality Standards set forth in this document specify concentrations of water constituents which, if not exceeded, are expected to result in an aquatic ecosystem suitable for the highest designated uses given. These values (criteria) are derived for individual water segments based upon the designated use or uses of the segment and the natural qualities of the waters.

An established water quality value (criterion) represents the maximum concentration (with exception of dissolved oxygen and pH) of a constituent in a stream segment that is allowed by the state. For some toxic substances, however, criteria represent both maximum and average or chronic concentrations allowed. Criteria apply at all times except where natural conditions cause them to be exceeded. All uses, non-point pollution sources, natural conditions and the water quality criteria are considered in the Office's determination of appropriate permit limits for each waste water discharge to a stream segment."

Water Quality Standards, Sec.X, Louisiana Register, p. 762, Oct. 20, 1984.
"NUMERICAL CRITERIA UNIT DEFINITIONS

CL - Chlorides in mg/L
SO_4 - Sulfates in mg/L
DO - Dissolved Oxygen in mg/L
pH Range - Range of pH Units
BAC - Bacterial Criteria (See Below)
TEMP - Temperature in °C
TDS - Total Dissolved Solids in mg/L
N/A - Not applicable at Present
* - Interim Numerical Criteria for Cl, SO_4 and TDS, Subject to Change, See Text

Bacterial Criteria (BAC)

1. Primary Contact Recreation
2. Secondary Contact Recreation
3. Public Water Supply
4. Shellfish Propagation

Designated Water Uses

A. Primary Contact Recreation
B. Secondary Contact Recreation
C. Propagation of Fish and Wildlife
D. Public Water Supply
E. Shellfish Propagation
F. Agriculture
G. Outstanding Natural Resource Waters"

Notification Regulations and Procedures for Unauthorized Discharges, Section 9.1.1, November 19, 1985
"In the event that a significant unauthorized discharge into the air, land or water environment of the State as defined by the guidelines in this part occurs , but does not constitute an emergency condition, the discharge shall notify the Department or appropriate Division promptly, but in no case more than twenty-four (24) hours after learning of the unauthorized discharge, by telephone or other -verbal communication means, or in person, in accordance with the notification procedures in Part IV of this regulation."

Notification Regulations and Procedures for Unauthorized Discharges, Section 9.3.5, November 19, 1985
"Any unauthorized discharge within a twenty-four (24) hour period which exceeds one (1) barrel of crude oil, or refined petroleum products not listed in the pollutant list in Part V of this regulation except where Sections 9.3.2, 9.3.3, or 9.3.4, above apply."

Notification Regulations and Procedures for Unauthorized Discharges, Section 9.3.6, November 19, 1985

"Any unauthorized discharge which does not result in an emergency condition buy does or may reasonably be expected to result in violation of the Louisiana Water Quality Standards and/or significant impairment of designated water uses."

Louisiana Water Pollution Control Regulations, Section 2.I.B., November 20, 1985

"2.I.B. Without first obtaining a LWDPS permit from the Office of Water Resources, (with the exceptions noted in Sections D and F below), no person shall:

1. Discharge or allow to be discharged any pollutants into the waters of the State from any facility or activity;

2. Construct any new facility or undertake a new activity, the operation or conduct of which would result in a discharge into the waters of the State;

3. Construct, install, operate, or alter any facility or activity or any extension or modification thereof or addition thereto, the operation or conduct of which would cause increases in the quantity of degradation in the quality of the discharge of pollutants into the waters of the State or which would otherwise alter the physical, chemical, or biological properties of any waters of the State in any manner not already lawfully authorized;

4. Construct or use any new outlet for the discharge of any

> pollutants into the waters of the State."

Louisiana Water Pollution Control Regulations, Section 3.I.D, November 20, 1985

"3.I.D. The discharge of any pollutant in quantities exceeding permitted limits or a discharge from a source or at a location not authorized by a permit shall be a violation of the Act."

APPENDIX D

STATE OF LOUISIANA
DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF: *
*
JOHN W. McGOWAN * **STATEMENT**
* **OF**
PROCEEDINGS UNDER LOUISIANA * **CHARGES**
ENVIRONMENTAL QUALITY ACT, *
LA.R.S. 30:1051 ET SEQ. *

JOHN W. McGOWAN, hereinafter referred to as "the Respondent", is hereby charged with the following violations of the Louisiana Environmental Quality Act, La.R.S. 30:1051 et seq., hereinafter referred to as "the Act".

I.

On or about January 31, 1986, Respondent did cause or allow the discharge of brine from an oilfield production site identified as the Devilbis Lease No. 19. On or about February 8, 1986, Respondent did cause or allow the discharge of oil from an oilfield production site identified as the Taylor

Lease No.3 and the Kratzer Lease No. 1. All of the above sites are located in the Roanoke Field of Jefferson Davis Parish, Louisiana. The cited unauthorized discharges are in violation of the Louisiana Water Pollution Control Regulations, Section 2.I.B and 3.I.C; the Regulations of the Stream Control Commission governing disposal of waste oil, oilfield brine, and all other materials resulting from the drilling, production, and transportation of oil, gas, or sulphur adopted January 27, 1953; the Order of the Stream Control Commission effective July 1, 1986; and Sections 1095 and 1096 of the Louisiana Environmental Quality Act.

II.

Respondent failed to notify the Department of Environmental Quality of the discharges at the Devilbis and Taylor

Leases, in violation of the Department's notification regulations and procedures for unauthorized discharges and Sections 1073 and 1096 of the Act.

Doneon this 4th day of September, 1986, at Baton Rouge, Louisiana,

/s/
PATRICIA L. NORTON, Secretary
Department of Environmental
Quality

PLN:ACC:dla

APPENDIX E

STATE OF LOUISIANA
DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF: *
*
JOHN W. McGOWAN *
P.O. BOX 55809 * ASSESSMENT
JACKSON, MISSISSIPPI 39216 * OF
* PENALTY
PROCEEDINGS UNDER THE *
LOUISIANA ENVIRONMENTAL *
QUALITY ACT, LA.R.S. 30:1051*
ET SEQ. *

In the following ASSESSMENT OF PENALTY issued to JOHN W. McGOWAN (hereinafter referred to as "the Respondent") by the Secretary, Department of Environmental Quality (hereinafter referred to as "the Department") under authority granted by the Louisiana Environmental Quality Act, La.R.S. 30:1051 et.seq. (hereinafter referred to as "the Act") and particularly by Section 1073 E of the Act.

FINDINGS OF FACT

I.

Respondent owns and operates oil production facilities in the Roanoke Filed known as the Devilbis, Kratzer and Taylor Leases.

II.

On or about January 31, 1986, a discharge of slat water from a salt water pit into a ditch occurred at the Devilbis Lease.

III.

On or about February 24, 1986, an overflow of oil in the amount of 10 barrels, more or less, occurred on the Taylor Lease. This discharge was confirmed or noted by Department of Environmental Quality personnel in an inspection on February 28, 1986.

IV.

No notice was given to the Louisiana Department of Environmental Quality of the discharges noted in paragraph II and III, as required by La.R.S. 30:1073 and 30:1096(D) of the Act and the Department's Notification Procedures for Unauthorized Discharges.

V.

The actions of Respondent constituted violations of the Water Pollution Control Regulations Section 2.I.B. and 3.I.D., Regulations of Stream Control Commission concerning the disposal of waste oil, oil field brine, and all other materials resulting from the drilling, production and transportation of oil, gas, or sulfur, adopted January 27, 1953; The Order of the Stream Control Commission effective July 1, 1968, and Sections 1095 and 1096 of the Louisiana Environmental Quality Act.

VI.

A Proposed Penalty Notice of $5,000 was issued to Respondent on May 22,1986. Respondent requested a hearing on the violation and that hearing was held Monday, November 3, 1986, before Richard J. Brazen, Jr., Hearing Officer.

VII.

Based upon the attached findings of the Hearing Officer, it has been determined that Respondent did allow discharges of oilfield wastes into the waters of the State without an appropriate license or permit. The Hearing Officer has submitted proposed findings of fact, conclusions of law and a recommended penalty which are attached here to and hereby incorporated herein by reference as if repeated in their entirety.

ORDER

Based on foregoing FINDINGS OF FACT, and the Hearing Officer's proposed FINDINGS OF FACT, CONCLUSIONS OF LAW and RECOMMENDED PENALTY, it is hereby ORDERED that:

I.

Respondent is hereby assessed a penalty of $56,000 for the violations cited herein.

II.

Payment of this assessment shall be made in full within twenty (20) days of receipt of this ORDER.

Failure of Respondent to timely pay this penalty shall result in further enforcement action, including, but not necessarily limited to, referral of this assessment to the Attorney General's Office for judicial collection together with all costs and expenses related thereto. This ASSESSMENT is effective on receipt.

Done at Baton Rouge, Louisiana this 16th day of January, (1986).(should be 1987).

/s/

Martha A. Madden, Secretary
Department of Environmental Quality

STATE OF LOUISIANA

DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF: *
*
JOHN W. McGOWAN *
P.O. BOX 55809 *
JACKSON, MISSISSIPPI 39216 *
*
PROCEEDINGS UNDER THE *
LOUISIANA ENVIRONMENTAL *
QUALITY ACT, LSA-R.S.30:1051*

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED PENALTY

FINDINGS OF FACT

I.

John W. McGowan owns and operates oil production facilities in the Roanoke Field known as the Devilbis, Kratzer and Taylor Leases.

II.

A. On January 31, 1986, on the Devilbis Lease, a discharge of salt water from a salt water pit occurred. No notice of this discharge was ever given to the

Department of Environmental Quality or any other state agency.

B. On the Kratzer Lease a discharge of less than 1/2 barrel of oil occurred. This charge has been dismissed, and there was no charge of failure to notify.

C. On February 24, 1986, an overflow of oil on the Taylor Lease of less than 10 barrels occurred. On February 28, 1986, an inspection by Department of Environmental Quality personnel confirmed this spill. No notification was ever given to the Department of Environmental Quality nor any other state agency.

III.

A. At the Devilbis Lease, a pipe used to carry salt water had been leaking for an undetermined period of time. Salt water was discharged into a ditch that ultimately leads into a body of flowing water. A minimum of 170 gallons of water per day were being discharged into the environment. The testimony of the expert produced by the defendant, McGowan, clearly indicated if every lease holder in the State discharged that amount of salt water into the environment on a daily basis it would be detrimental for the environment.

B. An oil discharge of less than 10 barrels occurred on the Kratzer Lease and was ultimately cleaned. No notice was ever given. The Respondent felt that since the oil was contained on the lease it was not necessary to notify the Department.

C. A discharge of salt water did occur on the Devilbis Lease and a discharge and spill of oil did occur on the Kratzer Lease. No attempt was made to notify the Department of Environmental Quality or any other state agency because of the interpretation of the laws by McGowan. McGowan contended that as long as any spill was contained on his lease he would have no obligation to report it to any agency. While the testimony did not determine how much saltwater had been discharged into the environment, it is unknown when the leak commenced. The leak has been stopped. The discharge occurred for a number of days previous to the finding of the leak.

CONCLUSIONS OF LAW

The actions of Respondent constituted violations of the Water Pollution Control Regulations Section 2.I.B. and 3.I.D., Regulations of Stream Control Commission concerning the disposal of waste oil, oil field brine, and all other materials resulting from the drilling, production, and transportation of oil, gas, or sulfur, adopted January 27, 1953,; The order of the Stream Control Commission effective July 1, 1968, in Sections 1095 and 1096 Louisiana Environmental Quality Act.

RECOMMENDED PENALTY

In establishing the amount of penalty, the following criteria under sections 1073(E)(a) are considered:

i. History of previous violations or repeated noncompliance.

Response:
There is no history of previous violations or repeated noncompliance.

ii. The nature and gravity of the violation.

Response:
a. The discharge at the Devilbis Lease was a grave violation because large amounts of salt water were being discharged or spilled.

b. The Taylor Lease discharge was a minor violation because such a small amount of oil was spilled and the spill was cleaned.

iii. Gross revenues generated by the Respondent.

Response:
Gross revenues were considered but are deemed confidential and therefore will not be listed here.

iv. The degree of culpability, recalcitrance, defiance, and indifference in the regulation or order.

Response:
a. John McGowan seems totally recalcitrant, and defiant, and indifferent, to the rules and regulations of the State of Louisiana. It is obvious, even though this is not the proper forum to attack the Rules and Regulations of the

Department, Mr. McGowan chose this forum to do so.

v. The monetary benefits were realized because they were not in compliance.

Response:
There were very little monetary benefits realized by McGowan through noncompliance.

vi. The degree of risk to human health and property caused by the violation.

Response:
a. It unknown whether there is significant risk of public health and property because of the Devilbis Lease violation due to the fact that it is unknown how long the discharge occurred and how much salt water brine was

in fact discharged into the environment.

b. There was no risk to human health and property caused by the violation at the Kratzer Lease.

vii. Whether noncompliance or violation and the surrounding circumstances were immediately reported to the Department and whether the violation or noncompliance was concealed or there was an attempt to conceal by the person charged.

Response:
While there was no attempt to conceal the discharges, there was definitely no reporting of the discharges. The unrealistic interpretation of the law and notification regulations by McGowan amounted to an intentional refusal to notify the Department.

viii. Whether the person charged has failed to mitigate or to make a reasonable attempt to mitigate the damages caused by his noncompliance or violation.

Response:
Respondent did attempt to mitigate the damage by cleaning up the oil and stopping the flow of oil and salt water in the future. Respondent did nothing to clean up the residue of the salt water discharge. McGowan did ultimately destroy the pit.

ix. The cost of bringing and prosecuting an enforcement action including staff time, equipment use, hearing records, expert assistance and such other items as the commission finds to be the cost of the action.

Response:

It cost the Department $3,575 and cost the respondents $34,386.50 to defend this particular allegation. Recommended penalties in this matter

a. Salt water discharge at the Devilbis Lease: $5,000.

b. Failure to notify the Department of said salt water discharge : $25,000.

c. Oil spill on the Kratzer Lease: $1,000.

d. Failure to notify the Department of said oil spill: $25,000.

Done on this 11 day of December, 1986.

/s/
Richard J. Brazan, Jr.
Hearing Officer

APPENDIX F

Selected Excerpts from Original Brief.

COURT OF APPEAL
FIRST CIRCUIT
STATE OF LOUISIANA

NO. CA 87 0677

JOHN W. McGOWAN
VERSUS
DEPARTMENT OF ENVIRONMENTAL QUALITY

ON APPEAL FROM THE
PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
RECOMMENDED PENALTY SIGNED BY
RICHARD J. BRAZAN, JR., HEARING
OFFICER FOR DEPARTMENT OF
ENVIRONMENTAL QUALITY ON DECEMBER 11, 1986
AND FROM THE FINDINGS OF FACT
AND ORDER SIGNED BY THE
SECRETARY OF THE DEPARTMENT OF
ENVIRONMENTAL QUALITY, M. A. MADDEN
ON JANUARY 16, 1987
APPEALED TO THE FIRST CIRCUIT COURT
OF APPEAL PURSUANT TO LA. REVISED
STATUTE 30:1072 AND RULE 2 OF THE
LA. COURT OF APPEAL, FIRST CIRCUIT

CIVIL CASE

ORIGINAL BRIEF ON BEHALF OF
PLAINTIFF/APPELLANT, JOHN W. McGOWAN
GARY L. BOLAND
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JURISDICTION

Louisiana Revised Statutes 30:1072; Rule 2 of the Louisiana Court of Appeal, First Circuit; United States Constitutional Provisions: Article III, Fourth Amendment; Fifth Amendment, Sixth Amendment, Ninth Amendment, Fourteenth Amendment; Louisiana Constitutional Provisions: Article 1, Sections 2, 13, 16 and 22.

SPECIFICATION OR ASSIGNMENT OF ERROR AND ISSUES FOR REVIEW

In compliance with R.S. 30:1072 and Rule 2 of the Louisiana Court of Appeal, First Circuit, John W. McGowan, lists the following as his Assignment of Errors:

1. The Secretary of the Department of Environmental Quality erred in fining McGowan $1,000.00 for an oil spill of less than one-half barrel on the Kratzer Lease, and $25,000.00 for failure to notify the Department of Environmental Quality of the spill.

2. The Secretary of the Department of Environmental Quality erred in fining McGowan $5,000.00 for the salt water discharge at the Devilbis Lease and $25,000.00 for failing to notify the Department of Environmental Quality of the discharge.

3. The Secretary of the Department of Environmental Quality erred in finding McGowan was required to notify the Department of Environmental Quality of the oil spill of less than ten barrels on the Taylor Lease when the oil was contained, cleaned up, and did not affect the waters of the state.

4. The Secretary of the Department of Environmental Quality erred in finding that McGowan violated Water Control Regulation Section 2.I.B. and 3.I.D.

5. The Secretary of the Department of Environmental Quality erred in finding that McGowan violated Regulations of the Stream Control Commission concerning the disposal of waste oil, oil field brine, and all other materials resulting from the drilling, production and transportation of oil, gas, or sulphur adopted January 27, 1953.

6. The Secretary of the Department of Environmental Quality erred in finding that McGowan violated the Order of the Stream Control Commission effective July 1, 1968.

7. The Secretary of the Department of Environmental Quality erred in finding that McGowan violated Sections 1095 and 1096 of the Louisiana Environmental Quality Act or of any other law, statute or regulation pertaining to the alleged violations by John McGowan.

8. The Secretary of the Department of Environmental Quality erred in concluding that the discharge at the DeVilbis Lease was a grave violation because large amounts of salt water were being discharged or spilled and that harm resulted or that the leakage ever got into or affected the waters of the state.

9. The Secretary of the Department of Environmental Quality erred in considering McGowan's gross revenues as a factor in assessing its fines.

10. The Secretary of the Department of Environmental Quality erred in presuming that McGowan was guilty due to his questioning of the interpretation of the Department of Environmental Quality's Rules and Regulations by requesting a hearing on the merits.

11. The Secretary of the Department of Environmental Quality erred in finding that McGowan realized monetary benefits through non-compliance with Department of Environmental Quality Rules and Regulations in that the evidence showed that money was expended in cleaning up the spills, replacing new equipment and new technology was installed to insure

that the environment would be protected. In fact, no monetary gain was realized.

12. The Secretary of the Department of Environmental Quality erred in determining that any harm resulted in the salt water leakage or discharge on the DeVilbis Lease.

13. The Secretary of the Department of Environmental Quality erred in finding that there was a need to clean up the residue of the salt water leak or discharge on the DeVilbis Lease when the evidence showed that no harm resulted from the leak and that the leak did not reach or affect the waters of the state.

14. The Secretary of the Department of Environmental Quality erred by applying rules and regulations over the property in question by improperly finding that the materials spilled

resulted in harm to the environment or violated the law.

15. The Secretary of the Department of Environmental Quality erred by fining John McGowan when the Department of Natural Resources had already assessed a $5,000.00 penalty for the same offenses as the Department of Environmental Quality did and after notification by the Department of Natural Resources of these same alleged violations.

16. The Secretary of the Department of Environmental Quality erred in recommending a penalty which was an abuse of discretion and was arbitrary and capricious in the manner of assessing the penalty and in the assessing of the amount of the penalty.

17. The Secretary of the Department of Environmental Quality erred in not taking into account the amount of money

spent on improvements to the lease, the replacement of equipment, and the introduction of more efficient and safer technology to the leases so that future spills would be fewer.

18. The Secretary of the Department of Environmental Quality erred in its interpretation and definitions concerning oil and salt water spills such as: the definitions of "waters of the state< contaminants, pollutants, etc.", and in its arbitrary and capricious interpretation of the statutes and regulations concerning oil and salt water spills or leaks and whether harm resulted.

19. The Secretary of the Department of Environmental Quality erred in applying rules and regulations which have not been properly promulgated which do not quantitatively or qualitatively define

harmful amounts of salt water and oil to require notification when the salt water and oil have been contained, cleaned up, and present no harm to the public or environment and do not reach or affect the waters of the state.

20. The Secretary of the Department of Environmental Quality erred in interpreting the law and regulations concerning the alleged violations and in improperly applying the law to facts not determined by the evidence in the case.

21. The statutes under which the Department of Environmental Quality have charged John McGowan with numerous violations are vague, arbitrary, and capricious.

CONCLUSION

In summary, John McGowan through undersigned counsel, requests this Honorable Court to overrule the Secretary's penalties assessed against John McGowan on the salt water leak at the DeVilbis Lease for $5,000.00 because no pollution occurred and no harm was suffered by the environment; to overrule the assessed penalty of $25,000.00 against John McGowan for failing to notify the Department of the leak, because the waters of the state were not polluted, affected, or discharged into and therefore no notice was required. It is further urged that the penalties of $26,000.00 assessed for the oil spill and failure to notify the Department of said oil spill be overruled involving the Kratzer Lease because no statutes, laws, or regulations were breached or violated.

Since no laws or regulations were violated regarding the Kratzer Lease, the penalty should be nullified. John McGowan would also request that no new fines be levied against actions pertaining to the Taylor Lease on the grounds that no laws or regulations in connection with the Taylor Lease were violated. We would further request this Honorable Court that waters of the state be strictly defined for the Department of Environmental Quality Control, so that the Department cannot take jurisdiction under a definition so broad that "whenever a drop of water falls on the ground it becomes waters of the state". We ask this Court for guidance in requiring the Department to set up scientific quantitative and qualitative standards supportable by science and technology which will give the oil industry guidance in exploring for and producing oil. When accidental and necessary spills occur in the oil field and are contained and cleaned up so that no environmental harm results to the environment or to the public, no penalties should be assessed!

Counsel requests leave of Court to submit additional evidence to this Honorable Court if the need arises. Counsel requests leave of Court at the oral arguments to supplement evidence and testimony pursuant to statute.

Respectfully submitted,

/s/______________________
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APPENDIX G

Selected Excerpts from States Original Brief.

COURT OF APPEAL
FIRST CIRCUIT
STATE OF LOUISIANA

NO. CA 87 0677

STATE OF LOUISIANA,
DEPARTMENT OF ENVIRONMENTAL QUALITY
V.
JOHN W. McGOWAN

ADMINISTRATIVE HEARING UNDER THE LOUISIANA
ENVIRONMENTAL QUALITY ACT
EAST BATON ROUGE PARISH
ON APPEAL FROM THE PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDED PENALTY
SIGNED BY RICHARD J. BRAZAN, JR, HEARING
OFFICER FOR THE DEPARTMENT OF ENVIRONMENTAL
QUALITY ON DECEMBER 11, 1986 AND FROM THE
FINDINGS OF FACT AND ORDER SIGNED BY THE
SECRETARY OF THE DEPARTMENT OF
ENVIRONMENTAL QUALITY, MARTHA A. MADDEN
ON JANUARY 16, 1987

APPEALED TO THE FIRST CIRCUIT COURT OF
APPEAL PURSUANT TO LOUISIANA REVISED
STATUTE 30:1072 AND RULE 2 OF THE
LOUISIANA COURT OF APPEAL,
FIRST CIRCUIT
CIVIL CASE

ORIGINAL BRIEF ON BEHALF OF THE STATE OF
LOUISIANA DEPARTMENT OF ENVIRONMENTAL
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(ORAL ARGUMENT REQUESTED)

APPENDIX H

Selected Excerpts from Reply Brief.

COURT OF APPEAL
FIRST CIRCUIT
STATE OF LOUISIANA
NO. CA 87 0677

IN THE MATTER OF
JOHN W. McGOWAN

ON APPEAL FROM THE
PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
RECOMMENDED PENALTY SIGNED BY
RICHARD J. BRAZAN, JR., HEARING
OFFICER FOR DEPARTMENT OF
ENVIRONMENTAL QUALITY
ON DECEMBER 11, 1986
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AND ORDER SIGNED BY THE
SECRETARY OF THE DEPARTMENT OF
ENVIRONMENTAL QUALITY, M. A. MADDEN
ON JANUARY 16, 1987
APPEALED TO THE FIRST CIRCUIT COURT
OF APPEAL PURSUANT TO LA. REVISED
STATUTE 30:1072 AND RULE 2 OF THE
LA. COURT OF APPEAL, FIRST CIRCUIT

CIVIL CASE

REPLY BRIEF ON BEHALF OF
APPELLANT, JOHN W. McGOWAN
IN RESPONSE TO APPELLEE'S BRIEF

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III. ISSUES

A. THE SPECIFICATIONS OR ASSIGNMENTS OF ERROR SET FORTH IN JOHN W. MCGOWAN'S ORIGINAL BRIEF FILED JULY 21, 1987 ARE VALID AND SHOULD NOT BE DISMISSED.

B. **THE OIL AND SALT WATER SPILLS IN THE AMOUNTS AND CONCENTRATIONS CITED WERE NOT POLLUTANTS AND NEVER ENTERED THE WATERS OF THE STATE; SINCE NO VIOLATION OF THE LAW OCCURRED,THERE WAS NO DUTY TO NOTIFY THE DEQ.**

C. THE CIVIL PENALTIES ORDERED BY THE DEQ'S SECRETARY SHOULD BE REVERSED BECAUSE JOHN W. McGOWAN'S DUE PROCESS RIGHTS HAVE BEEN VIOLATED.

V. CONCLUSION

John W. McGowan did spill less than ten (10) barrels of oil because of a mechanical equipment failure at the Taylor Lease on February 24, 1986. When Manuel inspected the lease on February 28, 1986, less than two (2) barrels of oil remained. The remaining oil was in a low depression in a pasture one-fourth (1/4) of a mile from the WATERS OF THE STATE. The oil was being absorbed in hay. On March 6, 1986, Manuel again inspected the Taylor Lease, and he found that the area was 99% cleaned up.

John W. McGowan did spill an undetermined amount of salt water which was leaking from an abandoned salt water pit. Since the pit was not used in McGowan's working operation, no one checked the pit on a routine basis. On January 27, 1986, David Russell (McGowan's environmental officer who is a biologist and a geologist) discovered the leak, and the leaking valve was fixed at his orders. Russell walked out the leak, and determined that no water pollution or environmental damage had occurred. Russell, who has a working knowledge of the rules, laws, and regulations relating to oil production in Louisiana, Texas, and Mississippi, was aware of the specific notification regulations regarding pollution, water pollution, waters of the state, harm and potential harm to the environment, and the chemical and biological properties of salt water and oil. Russell determined that no rules or laws had been broken.

The report written by Manuel in March of 1986 specifically determined that there was no damage to the environment and that the substances cited did not effect the State's waters. McGowan's representatives were invited to a conference with the DEQ to explain the circumstances of the spills and to explain to the Department how the spills had been taken care of. The tape recording of the conference was taped by the DEQ and introduced into evidence as McGowan Exhibit number 2. Like the Watergate tapes, there are gaps or missing parts on the tape. After the conference was notified that he was being fined $5,000.

At the pre-hearing conference, DEQ offered to reduce the fine to $3,000 since no environmental harm had occurred, if McGowan would plead guilty to all of the DEQ's charges. McGowan requested a hearing even though the hearing cost him over $27,000 and the hostility of the Hearing Officer and the DEQ. McGowan requested an objective forum so that he could obtain a fair and impartial judicial determination to ascertain if the law had been broken. The Hearing Officer from his demeanor and rulings determined early on the first day of the hearing that McGowan had broken the law. He fined John McGowan $56,000 for breaking the law and, as it was pointed out in the appellant's assignment of errors, the Hearing Officer made numerous material errors of fact and law in his decision.

McGowan appealed and the DEQ accused McGowan of being recalcitrant and indifferent and requests this Court to increase the fine to $62,000. At this time the Court must surely be asking itself, why didn't McGowan pay the $3,000 fine and promise the DEQ that he would never spill a glass of salt water into the waters of the state. He could have also promised that he would never ever spill any oil into the waters of the state in the future. It does not take a financial genius to determine that McGowan has already spent more than $56,000 denying that he caused more water pollution or spilled anything that caused harm to the environment or ever reached the waters of the state. He does not agree with the DEQ's position that water pollution occurred when the substances cited were contained in a low depression in his field and in a dry ditch. He does agree that DEQ does have authority over regulating the waters of the state by preventing water pollution. He does not agree that oil causes water pollution if it never reaches the water. He does agree with the definitions and interpretations of waters of the state, water pollution, and water courses as it is set out in the brief with numerous legal citations of authority to verify the application of those definitions. He does not agree that the DEQ regulations concerning the terms "significant harm to the environment" and "water pollution" are consistent or valid with the Constitutional and legislative intent in balancing the economic and social factors in the oil industry.

The evidence submitted and set forth in this brief clearly shows that no oil and gas producer in this state or anywhere else in the world can do one hour's work without spilling salt water and oil.

McGowan agreed that when water pollution occurs and if he causes the waters of the state to be degraded physically, chemically, biologically, or radiologically that notification to the DEQ is necessary. McGowan agrees that the substances must enter the waters of the state first. McGowan agrees that when he spills oil and salt water on a lease, he must contain it and clean it up. According to the evidence, he cleaned up the spills and no harm resulted to the environment!

McGowan asks this Court to define the terms according to the law and to strike down the arbitrary and capricious rules and regulations which the DEQ have inappropriately applied to the production of oil and gas on an oil field lease not involving State waters.

In these financially troubled times, this Court may never be asked to rule on anything so vital to Louisiana's oil and gas industry again! It is cheaper to pay a $3,000 fine than to ask for rules of reason or justice when one is dealing with a state agency that makes its own budget and expands its jurisdiction by fining out of existence the industry which has shaped Louisiana's economy.

Respectfully submitted,

/s/
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ATTORNEY FOR JOHN W.
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APPENDIX I

October 1, 1987

Mr. Stanley P. Lemoine
Clerk of Court
First Circuit Court of Appeal
P.O. Box 4408
222 St. Louis Street
Baton Rouge, LA 70802

RE: In the Matter of John W. McGowan
On Judicial Review From a Ruling
by the Department of Environmental
Quality
Appeal No. CA-87-0677

Dear Mr. Lemoine:

Enclosed are the original and seven copies of the following: Reply Brief filed timely, Non-Louisiana Cases Cited in brief, written supplemental evidence, Motion to Supplement scientific evidence pursuant to La.R.S. 49:964(E) when the case is heard during oral arguments.

As per our telephone conversation with your office, the Order is attached to and a part of the Motion. Please let me know when arguments will be scheduled for the above captioned case. Oral arguments were requested when the Brief was timely filed on July 21, 1987 and on page 32 of the Brief we reserved our rights to present evidence on the grounds that the Hearing Officer refused to allow us to present evidence refuting or challenging the scientific validity of the DEQ regulations.

Sincerely,
/s/
Gary L. Boland

Enclosure

IN THE MATTER OF:	* NUMBER: CA-87-0677
JOHN W. McGOWAN	* COURT OF APPEAL
ON APPEAL FROM THE DEPARTMENT OF ENVIRONMENTAL QUALITY, STATE OF LOUISIANA	* FIRST CIRCUIT * STATE OF LOUISIANA

MOTION TO SUBMIT SUPPLEMENTAL EVIDENCE

NOW COMES, John W. McGowan, through undersigned counsel, and moves this Honorable Court to allow said John W. McGowan to submit supplemental evidence at the oral argument to be held in the above captioned cause pursuant to Louisiana Revised Statute 49:964(E).

Respectfully submitted,
/s/
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ORDER

Considering the foregoing Motion of John W. McGowan requesting that he be allowed to submit supplemental scientific evidence at the oral argument to be held in the above captioned cause pursuant to Louisiana Revised Statute 49:964(E).

IT IS ORDERED, ADJUDGED AND DECREED that such submission of supplemental scientific evidence be granted.

Baton Rouge, Louisiana, this the _____ day of August, 1987.

____
JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon Ann C. Coco, Department of Environmental Quality, P.O. Box 44066, Baton Rouge, LA 70808, by placing same in the United States Mail, properly addressed and with postage fully prepaid, at Baton Rouge, Louisiana this the 1st day of October, 1987.

/s/ Gary L. Boland

APPENDIX J

FIRST CIRCUIT COURT OF APPEAL

STATE OF LOUISIANA

IN THE MATTER OF: APPEAL
NO: CA 87-0677

JOHN W. MCGOWAN ON JUDICIAL REVIEW FROM A RULING BY THE DEPARTMENT OF ENVIRONMENTAL QUALITY

MEMORANDUM IN OPPOSITION OF APPELLEE'S MOTION TO STRIKE

MAY IT PLEASE THE COURT:

The appellee, the Louisiana Department of Environmental Quality, contends that the reply brief submitted by John W. McGowan does not comply with the requirements of the Uniform Rules for the Courts of Appeal. Specifically, appellee contends that appellant breached Rule 2-12.6. Rule 2-12.6 is as follows:

> "Reply Brief. The appellant may file a reply brief if he has timely filed an original brief but it shall be strictly confined to rebuttal of points urged in the appellee's brief. No further

> briefs may be filed except by leave of Court."

Appellant John McGowan's brief rebuts each point urged in appellee's brief.

Since the problem Mr. McGowan has encountered with the Department of Environmental Quality has always been lack of any definite proscriptions and vague and over-broad application of nebulous standards capriciously applied to Mr. McGowan's oilfield operations, the vehicle chosen for this appellate proceeding was specifically chosen to be rebuttal of each point urged in appellee's brief. No other conceivable method of determining what appellee defines the law to be seemed suitable.

By allowing appellee to finally commit to their "understanding" of the law, only then could intelligent discussion and exploration of the propriety and applicability of this law be presented for determination by this Honorable Court. Appellee is clearly wrong in her assertions that appellant's brief "engages in numerous excursions into areas and issues not urged by appellee in its original brief."

Naturally, constitutional issues of due process and void for vagueness regulations claims are not a portion of appellee's original brief. However, denial of these constitutional issues and vagueness issues does appear in appellee's brief. Appellee's brief seeks to apply regulations that are void for vagueness and seeks to apply them in a manner that would deprive John McGowan of constitutionally guaranteed due process of law. This attempt is rebutted on these grounds in appellant's brief.

Appellant John McGowan has submitted as part of his reply brief documents he wishes the Court to consider. These documents were not permitted at the hearing and should be reviewed at this time to determine whether they are relevant. Specifically, relevance of these documents becomes obvious when the operative language of the statutes and regulations proscribing McGowan's future behavior contains terms such as: " . . . introduction . . . of any substance in concentrations which tend to degrade the chemical, physical, biological, or radiological integrity of such waters . . . " (R.S. 30:1093 Definition of water pollution); " . . . where fish life or beneficial animal or vegetable life in said waters may be destroyed or injured" (Rule 7 of Stream Control Commission amended January 27, 1953); " . . . by discharge into water bodies normally or seasonally sufficiently saline as to preclude any actual or potential pollution hazard due to such discharge" (Rule 8 of the Stream Control Commission amended January 27, 1953); "In the event that a significant unauthorized discharge" (9.1.1 from Notification Requirements for Significant Unauthorized Discharges); "Any unauthorized discharge which . . . may reasonably be expected to result in violation or significant impairment of designated water uses" (9.3.6 of Notification Requirements for Significant Unauthorized Discharges). Such terms used in regulations indicate the materiality and significance of the evidence offered repeatedly throughout the hearing and refused entry into the record on each and every occasion. Appellant seeks judicial determination of the relevance and materiality of this evidence. Upon determination that this evidence is relevant and material, John McGowan, appellant in this proceeding, submits this evidence as part of the record erroneously kept out by the Department of Environmental Quality and attorney Ann Coco. Ample documentation of repeated refusals to allow this evidence appears throughout appellant's brief, therefore, Summer v. Sutton as quoted in appellee's memorandum in support of motion to strike is non-applicable. Quoting the First Circuit and appellee's brief, the First Circuit put it thus "assertions and arguments in brief on appeal of facts not established by the evidence in the record cannot be considered by the reviewing Court." Repeated refusal to allow this evidence is well established by the evidence in the record and can be considered by this reviewing Court.

The proper Code of Civil Procedure Article for judicial review of adjudication is R.S. 49:964(d) which states: (in pertinent part) " . . . by stipulation of all parties to the review proceedings the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs the court may require or permit subsequent corrections or additions to the record." Pursuant to Subparagraph E or R.S. 49:964, application is herein made to this Court for leave to present additional evidence, in that it is respectfully urged this Court be satisfied that the additional evidence is material and failure of this evidence to be entered into the record lay in the hearing officer's adamant refusal to accept that same evidence into the record.

It is also notable that appellee's reliance on Summer v. Sutton in her memorandum is not only misplaced, but Subsection F of 49:964 seems to explicitly overrule Summer v. Sutton by statutory authority.

Finally, appellee contends that appellant's documents were not filed with the administrative law clerk responsible for preparing the record and are not certified and dated by the clerk. This is incorrect. All records and supplemental records were prepared for filing, certified, and dated as by law required.

For the foregoing reasons, it is respectfully urged that all documents submitted by the appellant be included as part of the record in John W. McGowan appellant. John W. McGowan exercises his right of judicial review of the administrative proceeding so necessary to insure due process and substantial justice.

Respectfully submitted,

/s/________________________
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APPENDIX K

In the matter of John W. McGowan

No. 87 CA 0677,

Court of Appeal of Louisiana,
First Circuit.

Oct. 12, 1988.

Rehearing Denied Nov. 30, 1988.

Civil penalty in sum of $5,000 was assessed against owner and operator of production leases. Upon operator's request, administrative hearing was held and Department of Environmental Quality assessed penalties in amount of $56,000 and review was sought. The Court of Appeal, Crain, J., held that: (1) secretary's finding that salt water and oil were discharged in sufficient quantities to pollute environment was supported by records; (2) drainage ditches into which oil and salt water were discharged constituted "waters of the state" within meaning Environmental

Quality Act; and (3) Secretary's imposition of $56,000 penalty was abuse of discretion.

Amended and affirmed.

Shortess, J., concurred in part and dissented in part for reason assigned and would grant rehearing.

Gary L. Boland, Hunter and Boland, Baton Rouge, for appellant John W. McGowan.

Ann C. Coco, Sr. Atty., Dept. of Environmental Quality, John B. Sheppard, Jr., Asst. Atty. General, Baton Rouge, for appellee State of La.

Before SHORTESS, LANIER and CRAIN,JJ.

CRAIN, Judge.

The Louisiana Department of Environmental Quality, Office of Water Resources (DEQ) issued compliance order to John W. McGowan, as owner and operator of the DeVilbis, Kratzer and Taylor production leases located in the Roanoke Field of Jefferson Davis Parish. The compliance order was issued for alleged violations of the Environmental Quality Act on the sites, the discharge of oil field wastes and failure to notify the DEQ of the discharges. A civil penalty sum of $5000 was assessed against McGowan for the violations. Upon McGowan's request an administrative hearing was held. The findings of fact, conclusions of law and recommended penalty of the Hearing Officer were adopted by the Secretary. The charges for violations at Kratzer lease were dismissed. McGowan was found to have discharged oil field waste at the Taylor and DeVilbis sites in violation of the Environmental Quality Act and to have failed to notify the appropriate authorities of the unauthorized discharges. Penalties were assessed against McGowan in the sums of $5000 for the salt water discharge at the DeVilbis site; $25,000 for failure to notify DEQ of discharge; $1000 for the oil spill at the Taylor site; and $25,000 for failure to notify DEQ of the oil spill. From this assessment of penalty McGowan appeals alleging twenty-one assignments of error.

[1] In the first assignment of error appellant alleges that the Secretary erred in assessing a $1000 penalty for the Kratzer oil spill and $25,000 for the failure to notify authorities of the spill. It is uncontested that less than one-half barrel of oil was spilled at the Kratzer site and that a spill of this quantity does not give rise to notification requirements. DEQ concedes in brief and the record reflects that in the proposed findings of fact the hearing officer found that the charges for

violations at the Kratzer site had been dismissed. However in the proposed penalty recommendations the hearing officer mistakenly referred to the 10 barrel oil spill at the Taylor site as the Kratzer site. The order issued by the Secretary does not refer to violations at the Kratzer site nor was a penalty assessed for the alleged Kratzer violations. The Secretary merely assessed a $56,000 penalty against McGowan for the DeVilbis salt water discharge and the Taylor 10 barrel oil spill. The assignment of error has no merit.

In brief McGowan concedes the occurrence of the salt water discharge at the DeVilbis site and the oil spill at the Taylor site. However, in the third, fourth, fifth, sixth, seventh, eighth, twelfth, thirteenth, fourteenth, eighteenth, nineteenth, twentieth and twenty-first assignments of error McGowan contends that the oil spill and salt water discharges do not constitute pollutants as defined under the Environmental Quality Act; did not enter waters of the state as defined under the Environmental Quality Act; and did not give rise to a duty to notify DEQ. He further alleges that the Secretary erred in determining that the discharges violated Louisiana Water Pollution Control Regulation §§ 2.I.B and 3.I.D; order of the Stream Control Commission, July 1, 1968; Rules 2 and 7 of the Stream Control Commission as amended January 27, 1953; La.R.S. 30:1073, 1095, 1096 and Notification Regulations and Procedures for Unauthorized Discharges §§ 9.3.5, 9.3.6.

The Secretary found that salt water was discharged from a salt water pit located on the DeVilbis site on or about January

31, 1986. The salt water exited the pit through a bleeder pipe and open valve which exited the east levee of the pit and extended 50 yards to the edge of a storm water drainage ditch on the DeVilbis site. The drainage ditch enters Gum Gully Canal which flows into Bayou Chene and comprises part of the Intracoastal-Mermentau-Lacassine Basin.

On February 28, 1986, DEQ water pollution specialist Kirk Manuel investigated an oil spill of an estimated 10 barrels of oil on the Taylor site. The oil spilled over the containment wall and traveled 200 yards through a drainage ditch. The flow was diverted from the ditch and traveled easterly into a cow pasture for 350 feet. The oil flow was diverted from the ditch by McGowan in order to prevent the oil from flowing through the remaining 600 feet of the ditch and into Gum Gully Canal.

Part IV of the Louisiana Environmental Quality Act, the Louisiana Water Control Law (La.R.S. 30:1091-1098), provides: The legislature finds and declares that the waters of the state of Louisiana are among the state's most important natural resources and their continued protection and safeguard is of vital concern to the citizens of this state. To insure the proper protection and maintenance of the state's waters, it is necessary to adopt a system to control and regulate the discharge of waste materials, pollutants, and other substances into the waters of the state.

La.R.S. 30:1092.

Under La.R.S. 30:1096 of the Louisiana Water Control Law:

A. (1) No person shall discharge or allow to be discharged into any waters of the state:

(a) any waste or any other substance of any kind that will tend to cause water pollution in violation of any rule, order, or regulation; or

(b) Any substance, the discharge of which violates any term, condition, or limit imposed by a permit.

(2) The provisions of this Part shall not apply to any unintentional non-point-source discharge resulting from or in connection with the production of raw agricultural, horticultural, or aquacultural products.

(3) No person shall violate any rule or regulation adopted under this Part of the terms of any permit or order issued under authority of this Chapter.

. . . .

Any activity resulting in the discharge of any substance into the waters of the state without a required license or permit is prohibited. La.R.S. 30:1095; Louisiana Water Pollution Control Regulation § 2.I.B. The "discharge of any pollutant in quantities exceeding permitted limits or a discharge from a source or at a location not authorized by a permit shall be a violation of the Act." Louisiana Water Pollution Control Regulation § 3.I.D. Additionally, the Order of the Stream Control Commission, effective July 1, 1968, provides, with certain exceptions, that no oil field wastes shall be allowed to drain or flow into waters of the state.

Appellant contends that the legislature has failed to set qualitative and quantitative standards for certain terms such as "pollutant" and water pollution, thus allowing for arbitrary and capricious interpretation of the statutes by DEQ.

[2] Standards accompanying a delegation of legislative authority need not be express if they may be reasonably inferred from the statutory scheme as a whole. *State v. Union Tank Car Co.,* 439 So.2d. 377 (La.1983).

"Water pollution" is statutorily defined as the "introduction into waters of the state by any means ... of any substance in concentrations which tend to degrade the chemical, physical, biological, or radiological integrity of such waters ...." La.R.S. 30:1093(4). "Pollutant" is defined in Louisiana Water Pollution Control Regulation (1)(IV) as "any substance introduced into the waters of the State by any means that would tend to degrade the chemical, physical, biological, or radiological integrity of such environment."

Louisiana Water Quality Standards § VII(B) establishes general criteria for water quality standards; § (C)(2) sets the chloride concentration in ancillary streams and waterbodies at 500 milligrams per liter; and Table 05 of section X establishes the chloride concentration in the Mermentau River Basin to be 90 milligrams per liter.

Manuel inspected the DeVilbis site on January 31, 1986. Brown or rust-colored standing water was observed in the ditch indicating that the chlorides had oxidized. He determined that a substantial discharge had occurred based on evidence of a recent drop in the salt water pit level and the damp stains on the cement pad under the valve. Manuel obtained samples of the standing water.

The laboratory reports indicated the chloride content of the water located near the open valve to be 5900 parts per million; the water sample obtained 200 yards downstream indicated a chloride content 5800 parts per million.

[3,4] We find that the statutes, rules, orders and regulations provide adequate qualitative and quantitative guidelines to determine which substances and quantities of substances constitute pollutants under the Environmental Quality Act. The Secretary's finding that the salt water and oil were discharged in sufficient quantities to pollute the environment is supported by the record.

Appellant next argues that the term "waters of the state" does not include the drainage ditches into which the salt water and oil were discharged. The oil and salt water were not discharged into waters of the state, thus, there was no violation of the Environmental Quality Act and the rules and regulations promulgated thereunder.

Under La.R.S. 30:1093(5), "waters of the state" consist of both "surface and underground waters within the state of Louisiana including all rivers, streams, lakes, groundwaters, and all other water courses and waters within the confines of the state...." It is almost identically defined in Chapter I, Part IV of Louisiana Water Pollution Control Regulations and Louisiana Water Quality Standards, § III.

> 'Surface water' means all lakes, bays, rivers, streams, springs, ponds, impounding reservoirs, wetlands, swamps, marshes, water sources, drainage systems and other surface water, natural or artificial, public or private within the State or under its jurisdiction that are not a part of a treatment system allowed by State law, regulation, or permit.

Louisiana Water Pollution Control Regulations, Chapter I Part IV.

[5] Unless specifically excepted by permit, the Louisiana Water Quality Standards apply to intermittent streams which may be dry during weather conditions, and to man-made water courses such as ditches or canals created specifically for drainage or water conveyance. Louisiana Water Quality Standards §§ V and VIII. The ditches or depressions in question convey storm water runoff from the lease sites to Gum Gully Canal into the Mermentau River Basin. Pollutants entering the ditches will generally be received by larger bodies of water.

[6] From a reading of the purpose and policy of the Louisiana Water Control Law, Louisiana Water Quality Standards (V) and (VIII), and the statutory and regulatory definitions of "waters of the state" and "surface water", the drainage ditches into

which the oil and salt water were discharged constitute "waters of the state" within the meaning of the Environmental Quality Act.

[7] **Although Manuel stated in the** Facility Inspection Form that the salt water discharge did not affect the waters of the state, he later clarified by DEQ memorandum that the swift flow in the Gum Gully Canal could have washed away all evidence and effects of the salt water discharge. We find the evidence supports the Secretary's determination that the discharges of the DeVilbis and Taylor sites were in violation of Louisiana Water Pollution Control Regulations Chapters 2.I.B. and 3.I.D; La.R.S. 30:1095 and 1096(A); and Order of the Stream Control Commission, effective July 1, 1968.

[8] The DeVilbis discharge was also in contravention of Rule 7 of the Order of

the Stream Control Commission, amended January 27, 1953. Rule 7 generally prohibits the discharge of oil field brine into any stream, lake or other body of water, or into any ditch or surface drainage leading to any stream, lake or other body of water. The Taylor discharge is in violation of Rule 2 of the Order of the Stream Control Commission, amended January 27, 1953, which prohibits the discharge of oily fluids on the ground, stream. lake or other body of water, or the conveyance of the oily fluids from the site in open ditches.

Having determined that the Taylor and DeVilbis spills were in violation of the above discussed statutes, rules and regulations we now consider whether McGowan violated the notification requirements imposed by La.R.S. 30:1073, 1096(D) and Notification Regulations and

Procedures for Unauthorized Discharges, Part III, 9.3.

La.R.S. 30:1073(J) and La.R.S. 30:1096(D) require notification to the appropriate authorities of a violation by any person who discharges, emits or disposes of any substances in contravention of the Environmental Quality Act, regulations or permit issued thereunder. Any unauthorized discharge in excess of one barrel of crude oil within a twenty-four hour period must be reported to the proper authorities. Notification Regulations and Procedures for Unauthorized Discharges, Part III 9.35. Thus, McGowan was required to report the Taylor oil spill.

[9,10] Part III 9.3.6 provides that unauthorized discharges which "may reasonably be expected to result in violation of the Louisiana Water Quality

Standards and/or significant impairment of designated water uses" must be reported. Appellant contends Part III 9.3.6 is vague and indefinite in that appellant is unable to determine the quantity of salt water discharged which triggers the notification requirement. However, as we noted previously, the Louisiana Water Quality Standards do set specific numerical criteria for the amounts of chloride per liter which triggers enforcement action. Additionally, the Order of the Stream Control Commission, effective July 1, 1968, prohibits the discharge of all oil field wastes into waters of the state. Part III 9.3.6 is neither vague nor indefinite and McGowan was required to notify the appropriate authority of this discharge.

PENALTY

[11] In the second assignment of error, appellant alleges that the Secretary erred in assessing penalties relative to the salt water discharge because DEQ failed to prove damage to the environment resulting from the discharge. A showing of actual damage to the environment is not required for assessment of a penalty under La.R.S. 30:1073(E). *Office of Environmental Affairs v. McWhorter and Associates, Inc.*, 499 So.2d 1062 (La.App.1st Cir.1984). This assignment of error has no merit.

In the eleventh and seventeenth assignments of error appellant alleges that in assessing the penalty the Secretary erred in finding that appellant received monetary benefits through his non-compliance with the Environmental Quality Act, and its rules and regulations. The Secretary found that the monetary benefits realized by appellant were insignificant. This assignment of error has no merit.

[12] In the ninth assignment of error appellant alleges that the Secretary erred in considering appellant's gross revenues as a factor in assessment of the penalty. La.R.S. 30:1073(E)(3)(a) (iii) provides that the gross revenues generated by the respondent shall be considered in determining whether a penalty should be assessed and the amount of the penalty. The assignment of error is without merit.

In the fifteenth and sixteenth assignments of error appellant alleges that the penalty assessed by the Secretary is arbitrary and capricious, constitutes double jeopardy and is unconstitutional in that the original penalty assessed by the Secretary prior to the hearing was $5000 and the penalty assessed after the hearing was $56,000.

Marion Fannerly, Enforcement Program Manager of the Water Pollution Control Division stated that the original $5000 penalty assessed by the Secretary was based on the fact that the salt water discharge was a significant one. But for the fact that the ditch emptied into a flowing stream, extensive damage to vegetation would have resulted. The oil spill was considered a minor violation. The average fine for oil field violations in the two previous years was $8700 and varied from $1500 to $20,000 for single incidents. In recommending the original $5000 penalty to the Secretary, Assistant Secretary Dale Givens stated, among other things, that the environmental damage was transitory in nature; the monetary benefits were insignificant; there was no prior history of violations; and the sites were being cleaned. The factors considered by the Secretary in assessing the original $5000 penalty were similar to those considered in assessing the $56,000 penalty after the hearing.

[13,14] An agency decision assessing a penalty should not be set aside unless it is arbitrary, capricious or characterized as an abuse of discretion. La.R.S. 49:964(G)(5); *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*, 452 So.2d 1152 (La.1984). After reviewing the record we conclude that the factors constituting the basis for the amount of penalty were considered when the $5000 penalty was assessed. The hearing itself appears to be the only basis for the $51,000 increase in penalty assessment. We find this to be arbitrary, capricious and an abuse of discretion.

Having determined the $56,000 penalty to be arbitrary and an abuse of discretion, we need not address the tenth assignment of error.

Accordingly the order of the Secretary assessing a $56,000 penalty is amended to reinstate the original $5000 penalty. In all other respects the matter is affirmed. Costs of this proceeding in the sum of $110 are assessed equally against DEQ and appellant.

AMENDED AND AFFIRMED.

SHORTESS, J., concurs in part and dissents in part. I would affirm the DEQ's penalty assessment on the salt water discharge (DeVilbis site).

APPENDIX L

Selected Excerpts from Original Brief to the Louisiana Supreme Court.

SUPREME COURT OF LOUISIANA
NO. 89 C 0012

JOHN W. McGOWAN
VERSUS
DEPARTMENT OF ENVIRONMENTAL QUALITY

ON APPLICATION
FOR WRITS OF REVIEW AND CERTIORARI
FROM THE FIRST CIRCUIT COURT OF APPEAL
PARISH OF EAST BATON ROUGE
DOCKET NO. CA/87/0677

ORIGINAL BRIEF ON BEHALF OF
JOHN W. McGOWAN
PLAINTIFF-APPELLANT

APPEAL COUNSEL:
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ORAL ARGUMENT REQUESTED

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III.

ASSIGNMENT OF ERRORS

A. The Hearing Officer and the Court of Appeals erred in failing to allow evidence to be introduced or to consider evidence which would have proved that the qualitative and quantitative standards enforced by the DEQ were capricious, arbitrary, vague, and unreasonable and did not protect the citizens of this state from abuse of discretion by those to whom the enforcement power is delegated.

B. The Hearing Officer erred in determining that McGowan was not in the proper forum to challenge a rule or regulation of the DEQ.

C. The Court of Appeal erred by not following the procedures, standards, criteria, and constitutional and statutory guidelines set out by the Louisiana Supreme Court for judicial review pursuant to Save Ourselves.

D. The Hearing Officer and the Court of Appeals erred in determining that the amounts of the concentration of the substances complained of were not important in determining whether the substances in the amounts were of sufficient quantity to cause harm or water pollution.

E. The Hearing Officer and the Court of Appeals erred in determining that the substances entered the Waters of the State.

F. The Court of Appeals erred in failing to conclude that the assignments of error pertaining to the Taylor and DeVilbis leases were valid.

IV.

ARGUMENT

A. THE DEQ AND THE COURT OF APPEALS VIOLATED JOHN W. MCGOWAN'S DUE PROCESS RIGHTS BY NOT FOLLOWING THE PROCEDURES, STANDARDS, CRITERIA, AND CONSTITUTIONAL AND STATUTORY GUIDELINES SET OUT BY THE LOUISIANA SUPREME COURT IN SAVE OURSELVES.

1. INTRODUCTION.

2. THE SALT WATER NOTIFICATION REQUIREMENTS ARE OVERLY BROAD AND VAGUE, SINCE THE DEQ INSPECTORS WHO INSPECTED THE LEASE DID NOT EVEN KNOW WHETHER ANY LAWS HAD BEEN BROKEN AFTER HE HAD INSPECTED THE LEASE.

3. THE LOUISIANA SUPREME COURT HAS SET OUT GUIDELINES FOR AN AGENCY TO INTERPRET LEGISLATIVE INTENT FROM ENVIRONMENTAL STATUTES USING WORDS TO MEAN WHAT THEY MEAN.

. . . .

In Rollins, the words "garbage," "leaves," "debris of any kind," and "branches" did not mean "hazardous waste," and in the case at bar, dry ditches, shallow depressions in pastures, and dry gullies should not be interpreted to mean WATERS OF THE STATE. It was error for the Hearing Officer and the Court of Appeals to interpret those words to expand the DEQ's jurisdiction and authority over individual private property rights of the citizens.

4. THE POLLUTION STANDARDS AS ENFORCED BY THE DEQ WILL RESULT IN ABOLISHING LOUISIANA'S OIL AND GAS INDUSTRY FOREVER.

. . . .

Marion Fannerly who testified that he had helped write the regulations for the Department testified that he could not identify the particular regulations which applied to the Devilbis lease regarding notice unless significant quantities were discharged into the waters of the state. He and Mr. Killeen of the department testified that one glass was significant to him (Tr. 313, L. 23-26). However, no quantitative amounts are listed in any of the regulations, and the interpretation of significant quantities is left to the discretion of the inspector in the field (Tr. 240-242).

Kirk Manuel, the Department of Environmental Quality Inspector who inspected the lease, testified that he did not know which laws or regulations applied to the Devilbis lease, but that the [sic] just wrote up what he saw and others in the Department interpreted what he had written (Tr. 172). If the Inspector who works for the Department of Environmental Quality can not properly identify the laws or regulations broken by McGowan, than there is a grave miscarriage of justice in allowing officials who have never seen the leases to guess at the law. In fact, Manuel testified that there were no regulations relating to a quantity of saltwater for a spill like the Devilbis lease (Tr. 175).

. . . .

Some evidence was allowed and was introduced by McGowan in the form of expert opinion testimony. Mr. Donald Sagrera was qualified and accepted by the Hearing Officer as an expert in drainage and soil and water reclamation (Tr. 535). He testified at length that none of the spills affected that environment or entered the waters of the state. That the land was completely cleaned up and reclaimed (Tr. 537-543). He also determined by scientific soil testing and examination of the sites and the evidence compiled by the DEQ that no water pollution occurred nor was there a discharge into the waters of the state from the Devilbis or the Taylor leases (Tr. 539-540). Dr. Maher, an expert witness who had also examined the sites and the evidence, also testified that no pollution had occurred from the spills and that the spills had never reached waters of the state or caused any environmental damage, harm, or water pollution.

. . . .

From the testimony of Mr. Fannerly (when being questioned or lead by the Agency attorney), it was clear that he selectively overlooked any and all of the sections in the regulations which limited substances that caused water pollution to being required to actually enter the water (Tr. 178-190). Additionally, since Mr. Fannerly testified quantity if unimportant (Tr. 221,L. 28-30) that one glass of saltwater and any amount of oil causes water pollution (Tr. 243, L. 18-27). If this is the attitude of the DEQ, then the DEQ's enforcement of those standards will abolish the oil and gas industry in Louisiana, and the enforcement of the AGency's standards is arbitrary, capricious, and unconstitutionally vague.

5. THE NOTIFICATION REQUIREMENTS AS ENFORCED BY THE DEQ OF DISCHARGES INTO WATERS OF THE STATE ARE AMBIGUOUS AND UNCONSTITUTIONALLY VAGUE.

6. THE REGULATIONS ARE AMBIGUOUS AND TOO VAGUE TO GIVE NOTICE OF POSSIBLE INFRACTIONS, ACCORDING TO THE LOUISIANA SUPREME COURT.

....

In the case at bar, words like "substantially increase", "appreciably injure human life", "materially injure or interfere with reasonable animal or plant life or property" all seem quite ambiguous; that ambiguity is matched or surpassed by the Louisiana Water Control Laws. Such words as "significant", "reasonably expected to be a violation", and "designated water uses" all purport to instruct a possible violator as to when he needs to notify the Department of Environmental Quality of an improper spill into WATERS OF THE STATE. (9.3.6 of Notifications Requirements).

7. THE LOUISIANA SUPREME COURT HAS DETERMINED THAT THE ENVIRONMENTAL STATUTES MUST BALANCE ENVIRONMENTAL COSTS AND BENEFITS ALONG WITH ECONOMIC, SOCIAL FACTORS FOR ITS CITIZENS.

8. WHERE AN AGENCY ADHERES ONLY TO ITS OWN POLICY AND REGULATIONS, IT IS IN ERROR AND JUDICIAL INTERVENTION IS NECESSARY.

9. THE DEQ'S PROCEDURE DOES NOT INSULATE AGENCY DECISIONS FROM REVIEW AND REVERSAL.

10. THE AGENCY IS ARBITRARY AND OVERLY PUNITIVE AND REQUIRES THE GUIDANCE OF A PROPER JUDICIARY TO ENSURE A FAIR ADJUDICATION IN THIS CASE.

11. JOHN W. McGOWAN WAS DENIED A FAIR AND IMPARTIAL HEARING.

The administrative officer conducted the hearing in a manner that fell short of the legislative intent in creating such hearings. It was the goal of the legislature, when setting up the procedure, to make it a fact finding body that would apply the relevant statutes to the case at hand. To carry out this function, the hearing should allow presentation of all evidence that is relevant to the alleged infractions. In the case at bar, the defendant was prevented from offering substantial scientific evidence to show that he had not violated the statute, and that the statutes in question did not apply to the defendant's situation (Tr. 497, L. 1-8). Nor was he able to present evidence for the constitutional balancing of the social and economic welfare of the citizens of this state as guaranteed in Save Ourselves.

For the decision at the administrative level to stand, it must have a reasonable basis in fact. It is impossible for a decision to have a reasonable basis if all of the factors that affect the action in question are not weighed. Where all facts are not properly attended to, a penalty should not be allowed to stand on review by the courts. Freeman Coal Mining Corp. v. Illinois Pollution Control Board, 313 N.E.2d 616 (Ill. App. 1974). The defendant did show with evidence introduced that the spill in question caused no harm to the environment, and the Hearing Officer and the Court of Appeals agreed! However, the additional evidence would have weighed both on the infraction and the fine levied by the DEQ. The regulations [S.C.C. 9.3.6] state that the spill must "reasonably result in a violation or be reasonably expected to impair water uses". No proof was introduced by the DEQ to show that either event occurred. McGowan's evidence which the Hearing Officer refused to hear clearly would have proved that there was no adverse effect on the environment, and that he was following the standards of the industry so that a balancing of environmental interests with the economic and social interests of the State. McGowan was also denied the opportunity to present evidence to test the reasonableness of the statute in determining that the level set by the DEQ were such that even a "violation" of the substances cited would not impair water use or degrade the integrity of the marine environment, as prescribed by law (Tr. 502, L. 24-30).

In particular, the evidence that the defendant was denied from presenting would have, if considered by the hearing officer and the Court of Appeal have exonerated John McGowan's actions. McGowan's evidence did show that other relevant factors, such as rainfall, 80 cows in the pastures, and other natural conditions, put more salt into the environment than McGowan's discharge. Even the Federal scheme, as applied in Louisiana requires proof of harm or consideration of evidence showing a de minimis effect. When evidence of lack of harm was unrebutted by any proof by the government of harm, no civil penalty could be enforced. In the case at bar, the Agency attorney, the Hearing Officer, and the Court of Appeals admitted that no harm occurred. "The defendant, however, must be allowed to offer proof that its oil spill was not harmful." U.S. v. Chevron Oil Co., 583 F.2d 1357 (5th Cir. 1978). This is required so that a balancing of the economic interests of the State's citizens and the environment can be maintained.

McGowan did produce a quantity of evidence that supported his claim that he caused no damage to the environment, and that he was within the tolerances of regulations at all times, but additional evidence not allowed by the Hearing Officer would have corroborated his claim (Tr. 381, L. 9-11 and Tr. 519, L. 10-26).

The reason for this is very simple. Oil and salt water are both naturally occurring substances. Salt water in particular is a substance that is present in virtually everything. A saline solution is used by doctors to restore body fluids. Salt is in almost all food we eat. The Gulf of Mexico has 30,000 ppm salt water. Over 20 billion pounds of salt is used annually to de-ice highways. Louisiana used over 1.6 million pounds of salt during the winter of 1981-82 to de-ice highways. Salt is in the air and falls with rain in concentrations of between 2 and 10 ppm. (Tr. 381, L. 12-21) The soil in the Roanoke area, a marine clay, has a natural salinity of approximately 250 ppm. (Tr. 381, L. 22-24) The aquifers that provide the drinking water for most of Louisiana were at one time salt water aquifers. Rain water entered these aquifers through outcrops and displaced the salt water downward, but even this water, which is used for human consumption has salt in it. The term "fresh water" in reality is a misnomer in that all water except distilled water has minerals in solution.

The primary difference between drinking water and the salt water produced along with oil is simply the concentrations of salt. (See the Louisiana Department of Transportation and Development, Office of Public Works 1984, Water Sources Technical Report #33. The Occurrences of High Concentrations of Chlorides on the Chreat Aquifer System of Southwestern Louisiana for more clarification.)

A clearer understanding might come from knowing how much salt enters our State waters in the Calcasieu-Mermentau drainage basin alone where Roanoke Field is located. On an average day the sources of salt are as follows: 4,000,000 lbs. from rainwater; 10,000,000 lbs. from leaching natural ground; 500,000 lbs. from fertilization; 7,000,000 lbs. from irrigation and municipal water supplies. See Louisiana Department of Transportation and Development Office of Public Works (May 1984); Average run-off in Calcasieu-Mermentau; Water Reports Legislature (1984); The Occurrence of High Concentrations of Chloride in the Chicot Aquifer System of Southwestern Louisiana, Water Sources Technical Report #33, Office of Public Works (1984).

Oil wells in the Calcasieu-Mermentau drainage basin produce approximately 500,000 barrels of salt water per day. This salt water contains a total of 20,000,000 pounds of salt. If all of this salt water was spilled there would be no general harm to the public. If one half percent of this salt water was spilled it would still be 1/100th the volume of salt water required to be significant. The refused evidence showed the localized significance of a salt water spill on the Devilbis lease in the

Roanoke Field. The Devilbis lease is examined in terms of its 160 acre "ecosystem".

The leak found by Mr. Russell on January 27, 1986 was estimated as being 170 gallons per day. Russell walked the leak out and determined that the leak had not caused water pollution and had not killed any vegetation, so he had the valve closed with a cheater pipe and did not notify the DEQ. He did not notify the DEQ because no water pollution occurred. The samples from the two puddles were determined by lab analysis to be around 6,000 ppm chlorides, but it should be remembered that the closest puddle to Gum Gully or the WATERS OF THE STATE was 200 yards away, according to Kirk Manuel, the DEQ inspector (Tr. p. 128, L. 29-30 and p. 129, L. 1-4). The largest of the two puddles contained 50 gallons of water.

This leak could add a certain additional amount of salt to the 160 acre Devilbis ecosystem above the natural amounts being added on a daily basis by rain, rainwater run-off, and livestock. However, in evaluating the salt water leak in terms of it's potential to pollute, one must consider whether or not the 170 gallons per day of 6,000 ppm salt water is significant in terms of the overall 160 acre DeVilbis ecosystem (Tr. 381, L. 17-25).

Although the evidence clearly established that Tenneco had been actively discharging into Gum Gully for from 5 to 20 years, McGowan does not use salt water pits in his operation but uses vacuum-induced salt water disposal wells. Assuming the "worst case hypothetical," although the evidence does not support this hypothetical, suppose that the leak was present at the time McGowan purchased the lease from Tenneco in October 1985 and leaked until the valve was closed with a cheater pipe January 27, 1986 by Davis Russell. That leak might have introduced as much as 1,020 additional pounds of salt into the Devilbis ecosystem.

The Roanoke area and the 160 acre Devilbis ecosystem receives an average of 60 inches of rainfall per year which will pick up a minimum of 2 ppm of salt from the air (Tr. 381, L. 17- 21). This amounts to 9,000 pounds of salt naturally occurring from rainfall. The rainfall continues to pickup salt from the soil, where there is an average of 20 inches of run-off in the Roanoke area (Tr. 381, L. 12-15). The average salinity of the run-off in the Calcasieu-Mermentau drainage basin is 20 ppm; therefore, the 160 acre Devilbis ecosystem would have

140,000 pounds of salt generated naturally by the rainwater's contact with the soil (Tr. 381, L. 22-24).

The Devilbis lease is used for cattle grazing, with one cow per two acres or 80 total. These cattle add an additional 11,680 pounds of salt to the Devilbis ecosystem through their urine elimination each year. Therefore the total amount of salt that occurs naturally within the 160 acre Devilbis ecosystem is 160,000 pounds per year (Tr. 497, L. 1- 8). The leak at the Devilbis pit, considering a worse case scenario, would have added an additional 6,570 pounds of salt per year to the Devilbis ecosystem. This amount of salt is insignificant considering the fact that 9,000 pounds per year occurs naturally from the air. The spill at the Devilbis could not have polluted the WATERS OF THE STATE because in terms of the naturally occurring salt the volumes are insignificant (Tr. 570, L. 4-14). Just as the naturally occurring salt in the Devilbis ecosystem can not reach State waters in harmful concentrations, neither could the spill at the Devilbis pit have reached the waters in harmful concentrations. In fact, the tests run by Manuel confirmed that absolutely no harm resulted from the leak, and his inspection facility forms bear this out (See Attachments A-D).

The Devilbis ecosystem is not atypical. However, the answer is, spillage at all of the leases in Louisiana of a similar volume would also have no absolutely affect on the receiving WATERS OF THE STATE. In fact, if all of the salt water produced in Louisiana in association with the oil and gas industry was dumped directly into WATERS OF THE STATE excluding the Mississippi River the salinity would be raised to less than 250 ppm which would not even cause water pollution according to the law of significant factors.

The point is that salt occurs naturally and is an integral part of the environment. Salt water in the amounts and concentrations cited by the DEQ have never caused documented pollution or harm to the public. The problem of salt water pollution from John McGowan's production is an imaginary one. The magnitude of this imaginary problem does not justify the DEQ's expanded definitions of already clearly defined terms such as WATERS OF THE STATE, "pollutant" and "discharge". There are no facts verifying uncontained salt water on a lease that justifies the DEQ's expansion of jurisdiction from **WATERS OF THE STATE** onto private property.

In the case at bar, neither the administrative hearing officer nor the Court of Appeals satisfied the demands of due process in John McGowan's case. By a reading of the transcript and the hearing officer's ruling on the relevancy of the evidence, it is clear that he was unconcerned with what WATERS OF THE STATE were or "what constituted pollution", or what a "significant" amount is considering the naturally occurring sources of salt at the Devilbis lease. The defendant must be given a judicial review of this evidence before an impartial judicial body with objectivity as its focal point for him to be accorded due process.

In Office of Environmental Affairs v. McWhorter & Associates, Inc., 449 So.2d 1062 (1st Cir. 1984), the court stated that "an impartial administrative tribunal is essential for efficient and fair implementation of the Environmental Affairs Act." From the transcript of the hearing, it is obvious that the officer was far from impartial in his handling of the matter. From offhand remarks directed at the defendant concerning his evidentiary decision, the officer showed unquestioned bias against the defendant. Hearings Officer Brazan restated this no less than eleven times during the course of the hearing. (Tr. 393, L. 1-10; Tr. 469, L. 15-20; Tr. 469, L. 22-28; Tr. 503, L. 8-13; Tr.309, L. 23-34; Tr. 284, L. 28-30; Tr. 503, L. 8-9; Tr. 178, L. 7-13; Tr. 366, L. 18-19; Tr. 497, L. 1-8; and Tr. 502, L. 24-30). The Court of Appeals compounded the error by refusing to consider the adequacy of the hearing and did not allow McGowan to further document his case by supplemental evidence as requested by motion and reserved in his Brief (See Attachments R and U).

Given the total inadequacy and partiality of the hearing below and the review by the Court of Appeals, it is imperative that John McGowan be given a chance to present his case in full to the court so that justice can be done. In United States v. Delian Cruises, Sa. et al 505 F.Supp. 79 (E. Dist. La. 1980) the court stated that the statute in question was ambiguous. In reviewing the trial transcript, the court concluded that it should hear the evidence anew, instead of relying on the record of the administrative agency. In the present case, the court records below, besides being fraught with erroneous conclusions, were incomplete due to the exclusion of relevant evidence that defendant attempted to offer. Defendant contends that he should be given a chance to present this evidence, so that a fair and impartial determination of the case can be made.

B. THE ASSIGNMENT OF ERRORS AND THE COMPLETE DISCUSSION OF THE RULES AND REGULATIONS HAVE BEEN COMPLETELY ADDRESSED IN JOHN McGOWAN'S REPLY BRIEF, PAGES 5-31, ATTACHMENT T, AND IS ADOPTED BY REFERENCE.

RESPECTFULLY SUBMITTED,

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VII.
ATTACHMENTS

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C. February 28, 1986, Complaint Form filled out by Kirk Manuel. . . . 41
D. March 6, 1986, Facility Inspection Form reported by Kirk Manuel 43
E. March 11, 1986, Letter from Kirk Manuel to Mike Schurtz with Lab Report . . .46
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G. May 23, 1986, Letter from J. Dale Givens to Patricia L. Norton . . . 53
H. Public Notice put out by Department of Environmental Quality Control for violations occurring on January 31, 1986 on the DeVilbis Lease and on February 8, 1986, Taylor Lease oil spill. (No violations occurred on February 8, 1986). (Actually the evidence shows that both dates are incorrect. The leaking valve at the DeVilbis Lease was corrected on January 29, 1986, two days before the inspection. The sample for the lab tests were taken from a small puddle near the leaking value and another puddle containing approximately 50 gallons (Tr. 113, L. 9-30). The puddle was 200 yards away from Gum Gully or the waters of the state (Tr. p. 128, L. 29-30, L. 3-21 and p. 129, L. 1-4). The oil spill on the Taylor Lease which occurred on or about February 24, 1986 was cleaned up before the inspection on

February 28, 1986. The remaining 2 barrels were contained on the lease and were in the process of being cleaned up. The oil remaining was contained and under the care and custody of McGowan's personnel, and the nearest drainage canal was 1/4 mile away (See Attachments B and C) 56
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APPENDIX M

In the Matter of John W. McGowan
No. 89-C-0012.

Supreme Court of Louisiana.

Feb. 17, 1989.

In re McGowan, John W.; - Plaintiff(s); applying for writ of certiorari and/or review; to the Court of Appeal, First Circuit, No. CA87 0677; Department of Environmental Quality, No. 2-86-0093.

Prior report: La.App., 533 So.2d. 999.

Denied. The result is correct.

APPENDIX N

SELECTED REFERENCES FROM AGENCY HEARING AND PLEADINGS

MR. MANUEL:

"...I write field notes and send them in to Baton Rouge."
Transcript p. 172 lines 27-28

MR. MANUEL:

"If someone lodges a complaint I investigate and write it on the complaint form and send it in."
Transcript p. 175 lines 12-13

MR. BOLAND:

"How does the operator know whether he has broken the law or not? ..."

MR. MANUEL:

"The water pollution regs, I'm sure, state a quantity."

MR. BOLAND"

"Where?"

MR. MANUEL:

"Of oil?"

MR. BOLAND:

"Water, salt water."

MR. MANUEL:

"Salt water. I'm not aware of that."

MR. BOLAND:

"No regulations."

MR. MANUEL:

"I'm not aware of the quantity."
Transcript p. 175 lines 14-23

MR. MANUEL:

"...I just told you I wrote up all complaints and sent them in to the office."
Transcript p. 176 lines 14-15

MR. MANUEL:

"I am not in the enforcement section, I do not make those decisions. I write up my complaints and sent them in."
Transcript p. 177 lines 22-24

HEARING OFFICER:

"Mr. Boland, we're not here to determine whether oil operators have a

difficult time understanding the rules and regulations. We're here, as I appreciate it, to determine whether or not any oil or salt water, in this case, was, in fact, released. I don't think your questions are relevant, but I'm not going to stop you from asking them. You may proceed."
Transcript p. 178, lines 7-13

MR. FANNERLY:

"A `pollutant,' as near as I recall, is any substance which alters the chemical, physical, biological, or radiological integrity of the environment."
Transcript p. 229 lines 27-30

MR. BOLAND:

"Is control of the substance a factor?"

MR. FANNERLY:

"I would say so, sir. If substance is controlled, it's not discharged."

MR. BOLAND:

"With regard to notification under 9.3.6, you said, `impairment of designated uses,' is that correct?"

MR. FANNERLY:

"I'm not sure of the number of it, but I do recall talking about that."

MR. BOLAND:

"Isn't it also part of that definition, that it is `significant impairment of designated uses'?"

MR. FANNERLY:

"It may be, sir. I'm not reading it."

MR. BOLAND:

"When we go to the Louisiana Quality Standards, which you said superseded the Stream Control Act, isn't it a fact that the Act specifically says, `significant impairment of designated water uses'?"
Transcript p. 230 lines 4-17

MR. BOLAND:

"Could you tell us how you determined whether or not there was a significant impairment of designated water uses by the water spill and would you refer us to the proper communications from the Department, other than the ones we've looked at, and the evidence which leads you to believe that."

MR. FANNERLY:

"Well, you've got a couple of questions there, Mr. Boland."

MR. BOLAND:

"I understand that."

MR. FANNERLY:

"In the first place, 'a significant impairment of the designated water uses,' the - well, since we're talking about chlorides, the water quality standard for that particular stream segment is 90 parts per million of chlorides...."

Transcript p. 230 line 30
Transcript p. 231 lines 1-13

MR. FANNERLY:

"Mr. Boland, I think it's fairly obvious the definition says a water course. A drainage ditch is a ditch through which water courses, otherwise it could not be involved in drainage. I would also refer you to the provisions of the Louisiana Water Quality Standards dealing with intermittent and man-made water courses. They specifically talk about ditches in there."

MR. BOLAND:

"Could you give me a specific regulation that you're referring to?"

MR. FANNERLY:

"I just did. The Louisiana Water Quality Criteria, which - as last amended in 1984."

MR. BOLAND:

"Which section, sir?"

MR. FANNERLY:

"I don't know the section, sir. I can find it if you care to give me a copy of the regulation."

MR. BOLAND:

"Would it be different from the earlier regulations:"

MR. FANNERLY:

"Which regulations?"

MR. BOLAND:

"Well, we have referred to the Stream Control Act as one of the violations, and the reporting act as one of the violations, and the definitions of waters of the State as one of the violations."

MR. FANNERLY:

"The definition of waters of the State is certainly not one of the violations, sir. It relates to all of them, but the problem with the regulations - other regulations that you're citing is they cover different subjects."

Transcript p. 235 lines 16-30
Transcript p. 236 lines 1-11

MR. BOLAND:

"Aren't they also talking about significantly impairing the designated water uses?"

MR. FANNERLY:

"All of them do not, no sir. The notification regulation, as I believe you've pointed out, does. I don't think you'll find that language in the other ones."

Transcript p. 235 lines 18-23

MR. BOLAND:

"Even though you have made no determination whether or not there is an impairment of the designated water uses -- "

MR. FANNERLY:

"As absolutely - well I take that back. We have made - the staff has made a determination that there probably was and impairment of the designated water usage -

uses. The samples that Mr. Manuel collected in that ditch by themselves would constitute impairment of the designated water uses. You simply can not use water with that chloride concentration for agricultural uses unless your uses include weed control."

MR. BOLAND:

"Did you look at the photographs that were introduced into the evidence?"

MR. FANNERLY:

"I have at one time, yes, sir."

MR. BOLAND:

"Isn't it a fact that there is grass growing in that ditch?"

MR. FANNERLY:

"I'd have to see the photographs, sir. I believe Mr. Manuel testified that there was."

Transcript p.236 lines 1-18

MR. BOLAND:

"Unauthorized discharge, as is used by the Act, is referring to pollutant, isn't that correct?"

MR. FANNERLY:

"I don't know that the Act refers to unauthorized discharges, sir. It probably does somewhere in it, but this particular regulation we're talking about has a definition in there."

MR. BOLAND:

"Isn't it a fact that an oil spill must degrade the environment to be a pollutant?"

MR. FANNERLY:

"I think you're confusing apples and oranges, Mr. Boland."

MR. BOLAND:

"Would you explain that"

MR. FANNERLY:

"Oil is a pollutant, period."

MR. BOLAND:

"In any quantity?"

MR. FANNERLY:

"Any quantity."

MR. BOLAND:

"Whether it is contained on the lease or not?"

MR. FANNERLY:

"It's still a pollutant, sir."

MR. BOLAND:

"Whether it's controlled on the lease or not?"

MR. FANNERLY:

"You're not changing the status of oil, sir. If you put it in the environment it's a pollutant."
Transcript p. 243 lines 12-30

HEARING OFFICER:

"Forgive me, and again, I don't want to prevent you from preparing your case, but it seems to me that if you want to attack the procedures that are used by the

Department, this is not a proper forum to do that."

Transcript p. 284 Lines 27-30
Transcript p. 285 Line 1.

HEARING OFFICER:

"Sustained. Mr. Boland, again, if you want to attack definitions, if you want to attack the Statute, if you want to attack the procedures, I don't believe this is the right forum. If you don't like the way they do things, that's fine. Go to a court of law that's appropriate jurisdiction and attack it as unconstitutional, inefficient, whatever you want. I don't think I'm here or do I think that I have the authority to rule on any procedures and law that they have, or even on the definitions. I'm here to determine whether or not, as I appreciate it, some type of pollution occurred, and if it occurred, whether a fine should be levied, and if you could limit yourself to those issues, I really would appreciate it. I understand where you're headed, I understand what you're trying to do, but I don't think I'm the right forum to attack definitions, to attack statutory provisions, to attack the way the Department does things, whether - you know, if you want to deal with the specifics of this case, fine, but you know, you said you're going to use - lay a foundation and get specifics and so far, all I've been hearing is generalities, and I'm sorry - -"

MR. BOLAND:

"What I'm having a problem with is you apparently know what pollution is."

HEARING OFFICER:

"It's sort of like pornography, I know it when I see it."

Transcript, p.309, Lines 22-30
Transcript, p.310, Lines 1-21.

MR. BOLAND:

"Didn't you indicate to one of Mr. McGowan's people that a glass was a significant quantity?"

MR. KILLEEN:

"I possibly have mentioned that, or that may have been another individual, ..."
Transcript p. 313 lines 23-26

MR. BOLAND:

"With regard to whether there was risk to human health and the environment - -"
Transcript p. 366, Lines 18-19

MR. BOLAND:

"And what is your understanding?"

MR. HERLIHY:

"That they are lake, streams, estuaries and other water courses. The catch word is `other water courses'. When we first started reading the rules, as an engineer or somebody that's responsible for reading the regulations and discussing them with field people, I have to read the regulations obviously, the key word was `water course', and I've read - pulled out Webster's Dictionary to try to figure out what Webster's Dictionary says about it, and I've gone to the Department of Transportation and read their definition of them and spoken to other various experts. I've spoken to people with DEQ prior to this hearing and asked them point blank what waters of the State were, water courses, and the key word is `water course'. My civil engineering and everything I've been able to put together is that a water course must be a stream, a continuous stream of water. It can't be obstructed, it can't be a ditch that's got a puddle here, a puddle there. It must be an uninterrupted stream, an uninterrupted channel for the flow of water.

MR. BOLAND:

"Uninterrupted channel of water?"

MR. HERLIHY:

"Yes."

MR. BOLAND:

"A continuous body of water?"

MR. HERLIHY:

"Yes."
Transcript p. 404 lines 9-30
Transcript p. 405 lines 1-3

MR. RUSSELL:

"Okay. I'm trying to. There's - there - from available sources other than what that spill put out there, there is a tremendously larger amount of tending to degrade from natural resources out there.

HEARING OFFICER:

"That is irrelevant. We're only interested in what was released from that pit into Gum Gully ...."
Transcript p. 502, lines 24-30

HEARING OFFICER:

"Mr. McGowan, I believe that what you're getting into is really irrelevant to the issue before us. I appreciate your concern and your feelings and again, if you think the law is unfair, as I told your attorney, there are certain jurisdictions for that. I'm not here, I have no authority to determine whether this is fair or unfair. We're just here to determine whether or not there was a discharge of oil and that's the only thing I think I can deal with. So I appreciate your concern but I think you're getting off the track as to what's relevant here. You're not going to be allowed to continue to answer the questions. Ms. Coco, ask your next question."

Transcript, p. 392, Line 30
Transcript, p. 393, Lines 1-14.

MR. BOLAND:

" Why was there no notification to the DEQ in January of 1986, when David Russell told you that the pipe was leaking?"

MR. HERLIHY:

"Well, for two reasons. One is that you get to playing with words and definitions again, but I've got the read the rules, too. I haven't got somebody from the DEQ Office working for me. I have to read them myself. I understand the word "water course". A ditch is not a water courses to me. I've asked Mr. Killeen point blank the question and he told me that roadside ditches could possibly be water courses, but he didn't feel like ditches within the confines of a lease were, and I told him that I could live with that, and you know, maybe I should've come down here and asked them point blank, "what's a water course?" but I read the definitions."

Transcript, p. 412, Lines 9-24.

HEARING OFFICER:

"Mr. Herlihy, based on your definition of a spill, if 100,000 barrels of oil were spilled on a lease, and you were able to contain it on that lease where it couldn't get to any state waters, then you would consider it not a violation of the code, would you?"

MR. HERLIHY:

"Well, once again, dealing with the definitions, you have to pollute to discharge, you have to get into State waters to discharge, so I haven't really technically violated the rules. I could have a flat piece of land without a drop of drainage on it, not the first ditch on it with a dike around it and I guess that wouldn't technically be a violation if I had a 10,000-barrel spill. I would obviously never have that type of property if I had a 10,000-barrel spill. I would certainly call the DEQ."

HEARING OFFICER:

"But based on your definition, if you take your definition of what's a violation, you could technically and legally, based on your definition, spill 100,000 barrels of oil, as long as you contained it on the lease, you wouldn't have to call the DEQ?"

MR. HERLIHY:

"That's correct, I would have firewalls that had 2000 or 3000 barrels of capacity that I could very easily - it may only have 2000 barrels of oil tankage, so I could spill 2000 barrels of oil into the firewall and it would be contained on my lease. I don't have any 10,000-barrel ones, so I have a hard time relating to that number.

HEARING OFFICER:

"So let's say 2000 barrels of oil, some kind of way, and we know that this would never happen on your lease, but let's, for hypothetical say this, was located outside the containment of that wall that's normally around because something is wrong, the pit was too low or whatever happened that happened, there was a fantastic rain and the pit was full of water and coming - the tank burst and the water went flowing off, as long as it didn't leave the lease, based on your definition, you wouldn't have to report it.

MR. HERLIHY:

"That's correct, yes. If I - let me give you an example of how that could happen. If i came out there and had a pipeline rupture and 1000 barrels of oil was coming out, and I had a bulldozer right next to it, I could dig me a pit right there on the spot, drag a suction pump up and pump it right back into the tank and I would not report that because

I didn't feel like it affected waters of the State, as long as my clean up - subsequent clean up didn't affect them."

HEARING OFFICER:

"Yes, it would. If I had a 2000-barrel spill that I was attempting to contain or containing and this imminent rain would, you know, possibly breach the containment and the oil is going to float on top of the water, I would consider that grounds for notification."

Transcript, p. 459, Lines 6-30
Transcript, p. 460, Lines 1-28.

HEARING OFFICER:

"I agree with you, Ms. Coco, that it is totally irrelevant; however, because of the way I started the hearing in allowing irrelevant information to get into, I don't feel at this time it'd be appropriate for me to exclude any irrelevant information that either side wants to introduce. I will, though, say for the record that if we continue having completely irrelevant information that does not rest directly with the fines that are involved and the - what occurred on these particular leases in front of me, that I reserve the right during the rest of this hearing to prevent irrelevant information from being entered into the record because I think 50 to 75 percent of what we have so far is irrelevant and I just think it's wasting the time of this Hearing Officer because it's not relevant to the issue we have here.

If Mr. McGowan wants to attack the rules and regulations, he has the right in another forum to do that. I've stated that several times. I don't have the authority to do that. We're just here to determine whether or no a - an infraction occurred and if an infraction occurred, whether or not you have to pay a penalty.

Whether or not this should or should not be an infraction is not my jurisdiction; however, in an abundance of caution in attempting to give the respondent and the State every opportunity to present their case, I will allow this evidence to be introduced."

Transcript, p. 469, Lines 5-30
Transcript, p. 470, Lines 1-4.

HEARING OFFICER:

"Fine. The definitions speak for themselves. Go ahead."

Transcript, p. 482, Lines 14-16.

MR. BOLAND:

"What are waters of the State as you defined it as a geologist and biologist going out in the field during that time in January of 1986?"

MR. RUSSELL:

"Waters of the State are very obviously any mineral - any waters that the State owns mineral under - minerals under. That would classify it. I've got a definition from the 1951 Stream Control Commission that says that. It's also - I classify it as any waters that could be used, in addition to the streams, lakes, so forth, and this catch-all, all water courses. I interpret that - -"

MR. BOLAND:

"By reading the statute?"

MR. RUSSELL:

"By reading the statute and by meaning this. A water course is any uninterrupted continuous body of water. Now, it could be standing or it could be flowing, but it needs to be a continuous body."

Transcript p. 486 lines 19-30
Transcript p. 487 lines 1-4

MR. BOLAND:

"With regard to those puddles, how much quantity of solution was there?

MR. RUSSELL:

In those puddles? Less than a barrel in those puddles, our estimation, but I did some checking and it got kind of interesting checking on what - what actually - how much salt is available every day in our environment and I checked with - I don't - I'm not so smart to think that I - that I could run these tests myself but I did check with people who are experts in their field. I did - do that kind of research, and after reviewing what they've written, it is my opinion that these facts are true.

I viewed there were 40 head of cattle out there on that piece of property. At 40 head of cattle in a day's time were put --"

MS. COCO:

"I'm going to object to this. It is patently irrelevant."

HEARING OFFICER:

"All right. I agree with you and I'm just tired of it. The objection's sustained."
Transcript, p. 496, Lines 16-30
Transcript, p. 497, Lines 1-8.

HEARING OFFICER:

"Mr. Russell, again we're not here to challenge the laws. We're here to decide what went in this particular instance what was spilled, if anything was spilled or discharged, whatever word you want to use, and whether or not you should be fined for that discharge."

MR. RUSSELL:

"I'm not questioning that, sir, something that went out on the ground. We don't have any problem with that."

HEARING OFFICER:

"Mr. Russell, I didn't come here to argue with you. I'm not going to let you testify about the information you want to testify to. You may ask the next question, Ms. Coco."

CROSS EXAMINATION of Mr. Russell (cont'd) BY MS. COCO:

"Mr. Russell, you said you were satisfied after reading Mr. Manuel's inspection report that this discharge did not enter waters of the State, is that correct."

MR. RUSSELL:

"That's what the report told me. I read it in plain English."

MS. COCO:

"Did you subsequently receive a compliance order that would have cast some doubt upon your understanding?"

MR. RUSSELL:

"I read a compliance order that listed these things that said we broke. It kind of surprised me. You've got a qualified man with a couple of degrees out in the field in biology and wildlife management, making the determination that no waters of the State have been affected and then I get this thing that says it has been and I'm going, I don't really, you know."

MS. COCO:

"Will you acknowledge, Mr. Russell, that there might be a difference in the lay understanding or a biologist's understanding of water and the legal definition of waters of the State?"

MR. RUSSELL:

"I think I'm, from what the testimony that you have put on, I think there is. In that pretrial thing that y'all and I went to, we went to, when I made that reference to waters of the State, told me that Mr. Manuel wasn't qualified to make that determination as the legal term.

If a biologist or a wildlife-fisheries man or a scientist can't make - can't say - a determination what are waters of the State is, I think we have come to a point where we're in a lot of trouble."

MS. COCO:

"Well, Mr. Russell, if you go in a court of law and you have conflicting definitions, do you think that the court is going to look at the law or is it going to look at some other - -"

Transcript, p. 503, Lines 7-30
Transcript, p. 504, Lines 1-28.

MR. BOLAND:

"Thank you, sir, but with regard to the last statement that Ms. Coco said, I do have some exhibits, which I stated earlier, which the experts have - -"

HEARING OFFICER:

"I think I fully understand that. We don't need to go into that. We've already dealt with that. Let's proceed please." Transcript, p. 514, Lines 3-10.

MR. RUSSELL:

"Well I daresay, well, I just don't know but I did not notice any deleterious effects to the environment because of it." Transcript, p. 521, Lines 17-20.

MR. BOLAND:

"I have offered and I think Ms. Coco has accepted that Dr. Killeen, Ph.D. in chemistry, Professor of Organic Chemistry, head of the department, at the University of Southwestern Louisiana, 27 years academic experience and consulting experience to oil and gas industry, and to chemical departments and chemical companies and land reclamation analysis. That with all of that, he would testify that the oil spill did not get into the waters of the State and that the salt discharge did not get into the waters of the State and that neither discharge were pollution from the standpoint of a chemist, from his analysis of oil pollution and the standards or that salt water was a pollutant as it is defined also."

Transcript p.522 lines 10-16 and 21-27

HEARING OFFICER:

"Yes. An expert in drainage and soil and water reclamation, but as far as an expert in the field of the definition of waters of the State, I don't - I'm not going to qualify him as an expert in that particular field."

MR. BOLAND:

"He can, of course, offer his opinion that'll go to the weight."

HEARING OFFICER:

"Sure. Any lay person can offer an opinion."

MR. BOLAND:

"I would like a ruling from the Hearing Officer. Is it, as Ms. Coco contended, only lawyers know and can read these statutes, to know what the rules are?"

HEARING OFFICER:

"Mr. Boland, that's a frivolous - you know. We know that other people besides us lawyers, though we deem ourselves to be Gods in that area at times, have the ability to read laws and understand them."
Transcript, p. 535, Lines 12-30
Transcript, p. 536, Line 1.

MR. SEGRERA:

"What I consider to be waters of the State, Mr. Russell touched on it a while ago and I agree with the fact that I feel as though it should be a continuous channel, stream or course of water, uninterrupted, and that - that be considered after rainfall water has been drained from a field, all the water that's intended to drain from the field has taken

place at that point, anything that would be an uninterrupted channel of water, I would consider to be waters of the State."
Transcript p. 538 lines 25-30
Transcript p. 539 lines 1-3

MR. BOLAND:

"...From the testimony heard this morning of David Russell, could you determine what the percolation rate of salt water would be if the leak had started approximately November 1st at the Devilbis lease?

DR. MAHER:

"Well, percolation rate is not dependent so much on time that it started but on the soil type and the weather conditions that occur while it's taking place. So, what I have done on the basis of Mr. Russell's report of what the rate he saw flow from the valve, estimated the length of the ditch and the width of the ditch and obtained from the infiltration rate that would have to occur in order for the water to reach the end of the ditch and knowing the approximate infiltration or percolation rates of this type of soil, I could then render an opinion that it was not coming out at a sufficient rate to ever reach the end of the ditch.

Now if it occurred over a long period, the evaporation would exceed the percolation rate, transcapillary movement would see to it that you would have no great downward movement of the water.

The down flow would occur to a point only where you would exceed or equal the infiltration rate of the soil but the length of the canal is too long at that rate of flow for it to reach the end of the canal or the ditch."

MR. BOLAND:

"Did you go out to the Devilbis lease?"

DR. MAHER:

"I did."

MR. BOLAND:

"Did you walk that ditch off?"

DR. MAHER:

"I did."

MR. BOLAND:

"Did you look at the measurements in the ditch?"

DR. MAHER:

"I did."

MR. BOLAND:

"And are these factors that you considered in determining the percolation rate?"

DR. MAHER:

"Yes, they are."

MR. BOLAND:

"With regard to the complaint form and the facility inspection report made by Mr. Manuel, do the tests that he performed indicated or prove that a discharge occurred into Gum Gully, the body of water that is at the end of that ditch?"

DR. MAHER:

"From his report, they do not."

MR. BOLAND:

"Do you have an opinion based on your field of expertise, as to whether or not water pollution occurred from the salt water leak into Gum Gully?"

DR. MAHER:

"I do not feel that the rate involved was sufficient for that to take effect. The first time it rained, the dilution effect would be great enough to hamper the effect of any - any of the - the pollution that might occur due to the salt water so it would be insufficient to or not useful for irrigation purposes or other purposes that do not require extremely low parts per million of salt."

Transcript p. 568 lines 23-30
Transcript p. 569 lines 1-30
Transcript p. 570 lines 1-14

MR. BOLAND:

"The amount of salt water from that drip from the point of which it was dripping to that ditch, if it had rained, would that cause water pollution, in your opinion?"

DR. MAHER:

"As I understood the report, the small standing bodies of water, in my opinion, would not pollute the stream."

Transcript p. 571 lines 12-18

MR. BOLAND:

"...If 10 barrels had been spilled over an acre of land, what would the diffusion rate be? Can you calculate that or render an opinion on it?"

DR. MAHER:

"I can calculate it. I think I might have done that at one time. The thickness, if you were to spread it over an area evenly of 10 barrels over an acre, it would be about the thickness of a sheet of paper, but it was confined into puddles evidently, otherwise they wouldn't be able to pick any of it up."

MR. BOLAND:

"And in fact, according to the report, they picked up all but about two barrels. Now if we assume that two barrels were out there at the point where you saw it, do you have an opinion as to whether or not those two barrels ever reached the waters of the State if the area between the puddles and Gum Gully were dry?"

DR. MAHER:

"I'm not - I'm not certain about where the break off points stopped on the spill, but if it had to go 900' and there was only two barrels involved, I would feel confident in saying that one barrel did not get into the waters of the State in 24 hours."

MR. BOLAND:

"Do you have an opinion based upon your field of expertise as to whether or not those two barrels got into the waters of the State standing where they were?"

DR. MAHER:

"I really don't believe they could have reached that point because they would be diffused into the soil and to the banks of the ditch system. Also, when oil is exposed to the sun, the lighter hydrocarbons tend to be burned off and the heavier ones stick a little better and the bacteria usually break these down if you can mix them in with the soil. This is the usual way of doing it."

MR. BOLAND:

"Do you have an opinion as to whether or not those two barrels constituted water pollution to the waters of the State?"

DR. MAHER:

"The two barrels? I don't believe two barrels did, based on what I was told."

MR. BOLAND:

"And that's based on the facts set forth in the inspection - -"

DR. MAHER:

"In the inspector's report, yes."

MR. BOLAND:

" - furnished by the State?"

DR. MAHER:

"Yes."

MR. BOLAND:

"How would you define waters of the State?"

DR. MAHER:

"My opinion of waters of the State are pretty much the same as Mr. Sagrera's; that is, they're waters that exist in runoff courses after the gravitational water has been removed from the farm; that is, the water that you wish to remove and the ditch is - has - no longer has a flow that's noninterrupted."

MR. BOLAND:

"That's uninterrupted water body?"

DR. MAHER:

"Right."
Transcript p. 572 lines 22-30
Transcript p. 573 lines 1-30
Transcript p. 574 lines 1-12.

The degree of culpability, recalcitrance, defiance, and indifference in the regulation or order.

Response:

a. John McGowan seems totally recalcitrant, and defiant, and indifferent, to the rules and regulations of the State of Louisiana. It is obvious, even though this is not the proper forum to attack the Rules and Regulations of the Department, Mr. McGowan chose this forum to do so.
Transcript, p. 594, iv.

Writ Application to Louisiana Supreme Court pp. 192-193

When questioned by the state's attorney regarding his definition of WATERS OF THE STATE, manuel stated: "The term I use, waters of the State is water" (Tr. 106, L. 16). manuel then further described WATERS OF THE STATE as follows: "As a field biologist, I use that term to indicate a State conveyance which actually has H_2O, water, within the conveyance and flowing" (Tr. 138, L. 12-14). Manuel defined WATERS OF THE STATE another time as: "I used the term `State Waters' to denote a flowing stream capable of supporting aquatic habitat" (Tr. 155, L. 7-8). Under cross examination Manuel was asked: "So, in your March 6th report, you state that it did not affect the waters of the State according to your report, correct?" Manuel answered "The waters - `waters of the State,' yes, sir. It did not get to actually water, H_2O" (Tr. 157, L. 28-30 and Tr. 112, L. 1-2). Manuel's testimony would lead one to believe that McGowan should not be charged with failing to notify for discharging into the WATERS OF THE STATE because none of the substances complained of ever reached "water" or "waters of the State" as defined in the Statute or explained by Manuel. If the substances did not reach water, there was no water pollution. Recall that Manuel was the only DEQ official who saw the alleged incidents, although he failed to take any photographs of the alleged events. Additionally, the chlorides found in the two puddles in the otherwise dry ditch at the Devilbis lease was not "water flowing" or "capable of supporting aquatic habitat".